

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 11, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Viacom International, Inc.

v.

Armstrong Interactive, Inc.

—
Opposition No. 91243941
—

Bruce R. Ewing and Connor Hansen of Dorsey & Whitney LLP,
for Viacom International, Inc.

Howard Leib of Howard Leib Esq. PC,
for Armstrong Interactive, Inc.

—
Before Shaw, Heasley, and Allard,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant Armstrong Interactive, Inc. has applied to register DOUBLE DARE (in standard characters) on the Principal Register under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on its allegation of a bona fide intention to use the mark in commerce for:

Interactive entertainment software, namely, video game programs, computer game programs, computer game software; Pre-recorded musical sound recordings, audio recordings, audio cassettes, compact discs, digital audio discs, phonograph records, musical video recordings, video recordings, video cassettes, video discs, DVDs, CD-ROMs, all featuring educational content for infants and children; Children's educational

computer software featuring educational content for infants and children, in International Class 9;

Clothing, namely, T-Shirts, shirts, caps, pants and jackets, in International Class 25;

Toys, games and playthings, namely, plush toys, stuffed toys, talking toys, toy figures, dolls, toy models, toy vehicles, water toys, wind-up toys, children's multiple activity toys, construction toys, board games, action skill games, card games, electronic action toys, electronic toy vehicles, electronic learning toys, electronic games for the teaching of children, toy musical instruments, collectible toy animals and toy figurines, puzzles, and handheld electronic game units; Computer and video game apparatus, namely, video game machines for use with televisions; Toy modeling compounds and accessories for use therewith, namely, molds and extruders, in International Class 28; and

Entertainment, namely, a continuing children's show, and segments thereof, broadcast over television, cable televi[s]ion and the internet, in International Class 41.¹

Opposer Viacom International, Inc. has filed a Notice of Opposition to registration of Applicant's mark, alleging likelihood of confusion and dilution by blurring of its claimed common law mark DOUBLE DARE, used in connection with entertainment services in the nature of a competition-based program series, featuring live action, comedy and drama, provided through cable television, broadcast television, internet, video-on-demand, and through other forms of transmission media; entertainment services, namely, organizing, producing and presenting live events in the nature of a competition-based game show, as well as DVDs, t-shirts, socks, costumes, and board games.² 15 U.S.C. §§ 1052(d), 1125(c).

¹ Application Serial No. 87766798 was filed on January 23, 2018.

² Notice of Opposition, 1 TTABVUE. Opposer also claimed dilution by tarnishment. Notice of Opposition at ¶ 34, 1 TTABVUE 10. But its main brief focused on dilution by blurring, not tarnishment, so that claim is waived or forfeited. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) (petitioner's pleaded descriptiveness and geographical descriptiveness claims not argued in brief deemed waived)

Applicant's Answer denies the salient allegations of the Notice of Opposition and adds, as affirmative defenses, that "Opposer has abandoned any and all rights in the mark(s) on which it bases this Opposition, including, but not limited to, both express and implied abandonment" and that "Opposer is estopped from pursuing its claims for relief, or has waived such claims, as a result of Opposer's own actions or inactions, including, but not limited to, Opposer's failure to police any rights it may once have had."³

The opposition is fully briefed. In its main brief, Opposer adds a claim that Applicant lacked a bona fide intent to use the DOUBLE DARE mark on or in connection with its identified goods and services when it filed its application.⁴ We address *infra* whether this added claim has been tried by implied consent.

I. Background

In 1986, Opposer aired a children's game show on its Nickelodeon cable channel under the mark DOUBLE DARE. In the DOUBLE DARE game show, hosted by Marc Summers, two-member teams of children ages ten to thirteen competed to win cash and prizes by answering trivia questions, completing messy physical challenges (involving green slime, whipped cream, and pies) and facing the "slobstacle" obstacle

aff'd, 565 F. App'x 900 (Fed. Cir. 2014) (mem.) *cited in* *Norris v. PAVE: Promoting Awareness, Victim Empowerment*, 2019 USPQ2d 370880, *1 n.2 (TTAB 2019).

³ Answer, 9 TTABVUE 10. Applicant also raised as a putative defense the allegation that "Applicant reserves all affirmative defenses not stated herein, in the event that discovery reveals they may be appropriate." *Id.* The reservation of rights to raise more affirmative defenses is not in itself an affirmative defense. *Philanthropist.com, Inc. v. Gen. Conf. Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, *4 n.6 (TTAB 2021) appeal docketed (Fed. Cir. Aug. 5, 2021).

⁴ Opposer's brief, 41 TTABVUE 54-57.

course.⁵ DOUBLE DARE begat several spin-off shows—“Super Sloppy Double Dare,” “Family Double Dare,” and “Double Dare 2000,” which, true to its title, first aired in the year 2000.⁶

Opposer ceased airing new episodes of DOUBLE DARE in 2000.⁷ Reruns followed. Its Principal Register registration for DOUBLE DARE for “production and distribution of a children’s game show television program” in International Class 41, which issued in 1989, was not renewed, and was cancelled in 2009.⁸

Applicant contends that Opposer abandoned DOUBLE DARE between 2009 and 2018, leaving the mark available for registration via Applicant’s intent-to-use application for DOUBLE DARE for a children’s program and related goods, filed on January 23, 2018. It states, “Applicant believes that it is entitled to take a mark, no longer in use, and create new and original content under that mark.”⁹ Opposer

⁵ Declaration of Brian Banks, Opposer’s Vice President and Executive in Charge of Production for Live Action, ¶¶ 4-7, 21 TTABVUE 3-4; Declaration of Thomas Kingsley, Opposer’s Director Nickelodeon Experience, ¶ 3, 22 TTABVUE 2; Declaration of Joann Acevedo, Opposer’s Vice President of Consumer Products, ¶ 3, 34 TTABVUE 3.

(The name “Double Dare” had been used by the Goodson/Todman company in connection with a game show hosted by the late Alex Trebek in 1976-77, but that show was cancelled in 1977, almost a decade before Opposer began using the DOUBLE DARE mark in connection with its children’s game show. *See* declaration of Michael Klinghoffer, former employee of Nickelodeon and co-creator of the 1980’s version of DOUBLE DARE ¶¶ 1-4, 29 TTABVUE 26.)

⁶ Banks decl. ¶¶ 7-8, 21 TTABVUE 4-5.

⁷ Banks decl. ¶ 8, 21 TTABVUE 4.

⁸ Registration No. 1528831, issued March 7, 1989, cancelled Oct. 10, 2009. Opposer also owned Principal Register registrations for DOUBLE DARE for “children’s question and answer games” in International Class 28 (Registration No. 1648236, cancelled June 29, 2002), “publications, namely, books about games and game shows” in International Class 16 (Registration No. 1618682, cancelled April 29, 1997), and “clothing, namely T-shirts” in International Class 25 (Registration No. 1623739, cancelled Dec. 2, 2001).

⁹ Applicant’s brief, 41 TTABVUE 6.

contends that Applicant “Armstrong is in the business of picking up abandoned trademarks once used with children’s television programs, like WONDERAMA, and using them with new content Armstrong creates.”¹⁰ Opposer maintains, however, that it retained its common law rights in the DOUBLE DARE mark through various ongoing uses between 2009 and 2018, and has priority in this opposition.¹¹

On April 25, 2018, Opposer announced that it was rebooting DOUBLE DARE with 40 brand-new episodes.¹² About a week later, on May 3, 2018, Applicant’s counsel wrote to Opposer, claiming that Applicant had superior rights in DOUBLE DARE based on its application, and demanding that Opposer cease and desist any efforts to produce its DOUBLE DARE show unless it obtained a license from Applicant.¹³ Days later, Opposer responded negatively, claiming that “Viacom’s 30 years of prior use of the DOUBLE DARE mark accords Viacom clear priority over [Applicant], and [Applicant’s] planned use would infringe Viacom’s rights.”¹⁴ In mid-May 2018, Opposer filed intent-to-use applications to register DOUBLE DARE¹⁵ and

¹⁰ Opposer’s brief, 41 TTABVUE 11.

¹¹ Banks decl. ¶ 13, 21 TTABVUE 6, 23 TTABVUE 6 (confidential).

¹² Notice of Opposition ¶ 15 and ex. G, 1 TTABVUE 7, 43-45; Banks decl. ¶¶ 10, 26-27, 21 TTABVUE 4, 13; Acevedo decl. ¶ 3, 34 TTABVUE 3.

¹³ Correspondence of May 3, 2018, ex. H. to Civil Action No. 1:18-cv-06117-NRB, appended to Opposer’s motion to suspend opposition proceeding. 4 TTABVUE 70-71

¹⁴ Correspondence of May 8, 2018 from Opposer’s counsel to Applicant’s counsel, ex. I to Civil Action No. 1:18-cv-06117-NRB, appended to Opposer’s motion to suspend opposition proceeding. 4 TTABVUE 72-75; Applicant’s NOR, 28 TTABVUE 1025-27.

¹⁵ DOUBLE DARE, Application Ser. No. 87920341 for “Entertainment services in the nature of a continuing competition-based program series, featuring live action, comedy and drama provided through cable television, broadcast television, internet, video-on-demand, and through other forms of transmission media; providing online information in the field of entertainment concerning television programs; entertainment services, namely, organizing, producing and presenting live events in the nature of a competition-based game show” in International Class 41; Application Ser. No. 87920336 for “Toys, games and playthings, namely, dolls and accessories therefor, action figures, action figure play sets, character

NICKELODEON DOUBLE DARE¹⁶ on the Principal Register for entertainment programming, live events, clothing, and toys.¹⁷ Applicant's counsel wrote to Opposer on June 4, 2018, contending that Opposer's efforts would not revive its previously abandoned mark: "It is our expectation that our applications will be granted and, therefore, yours will be denied."¹⁸ Despite Applicant's letters, Opposer's DOUBLE DARE reboot series aired on June 25, 2018, with the original host, Marc Summers, as its executive producer and announcer.¹⁹

figures, character figure play sets, toy figurines, plush toys, toy vehicles and accessories therefor, children's multiple activity toys, toy building sets, children's educational toys for developing cognitive skills, ride-on toys, construction toys, parlor games, puzzles, role-playing games, card games, board games, interactive board games, action skill games, action target games, electronic hand-held games for use with external display screen or monitor and electronic action toys" in International Class 28; Application Ser. No. 87920329 for "Clothing, namely, shirts, t-shirts, sweatshirts, sweaters, blouses, pants, jeans, trousers, shorts, suits, underwear, pajamas, jackets, coats, vests, socks, stockings, tights, dresses, skirts, swimwear; headwear, namely, hats, caps, beanies, visors, headbands, bandanas; clothing accessories, namely, belts, ties, neckties, gloves, mittens, scarves; footwear, namely, boots, shoes, sandals, slippers; Halloween costumes" in International Class 25.

¹⁶ NICKELODEON DOUBLE DARE, Application Ser. No. 87920333 for "Entertainment services in the nature of a continuing competition-based program series, featuring live action, comedy and drama provided through cable television, broadcast television, internet, video-on-demand, and through other forms of transmission media; providing online information in the field of entertainment concerning television programs; entertainment services, namely, organizing, producing and presenting live events in the nature of a competition-based game show" in International Class 41; Application Ser. No. 87920326 for "Clothing, namely, shirts, t-shirts, sweatshirts, sweaters, blouses, pants, jeans, trousers, shorts, suits, underwear, pajamas, jackets, coats, vests, socks, stockings, tights, dresses, skirts, swimwear; headwear, namely, hats, caps, beanies, visors, headbands, bandanas; clothing accessories, namely, belts, ties, neckties, gloves, mittens, scarves; footwear, namely, boots, shoes, sandals, slippers; Halloween costumes" in International Class 25.

¹⁷ Opposer Viacom filed all of the foregoing applications on May 14, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on its allegation of a bona fide intention to use the marks in commerce.

¹⁸ Correspondence of June 4, 2018 from Applicant's counsel to Opposer's counsel, ex. L. to Civil Action No. 1:18-cv-06117-NRB, appended to Opposer's motion to suspend opposition proceeding. 4 TTABVUE 88-90.

¹⁹ Banks decl. ¶¶ 27, 35, 21 TTABVUE 13, 17, 23 TTABVUE 13 (confidential); Kingsley decl. ¶ 3, 22 TTABVUE 2, Summers dep. 62:12-22, 32 TTABVUE 63.

Opposer instituted a civil action against Applicant in the U.S. District Court for the Southern District of New York on July 5, 2018 seeking a declaratory judgment that Opposer owns and has priority over the DOUBLE DARE mark. A few months later, it instituted this opposition proceeding, which was promptly suspended in view of the pending District Court action.²⁰ The District Court dismissed the action for lack of subject matter jurisdiction, noting inter alia that “given the lack of presently enforceable rights, the substantial uncertainty surrounding when, if ever, Armstrong will acquire such rights, and the absence of any concrete harm suffered by Viacom from delaying adjudication, we conclude that plaintiff has failed to allege facts showing a controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”²¹ The court concluded, “Not only is the TTAB the more appropriate forum to resolve such a dispute; absent any live controversy as to infringement, it is the only body of competent jurisdiction to do so.”²² This opposition proceeding resumed.²³

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action (formerly called standing) must be established in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020) (citing

²⁰ 6 TTABVUE (proceeding suspended pending determination of Civil Action No. 1:18-cv-06117-NRB in the Southern District of New York).

²¹ Memorandum and Order, *Viacom Int’l Inc. v. Armstrong Interactive, Inc. and Charles Armstrong*, Civil Action No. 1:18-cv-06117-NRB, 2019 USPQ2d 308465, *8-9 (SDNY 2019). 7 TTABVUE 25 (internal punctuation omitted).

²² 7 TTABVUE 20.

²³ 8 TTABVUE.

Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125-26 , 109 USPQ2d 2061, 2067 n.4 (2014)), *cert. denied*, ___ U.S. ___ (2021). A party in the position of plaintiff may oppose registration of a mark when it is in the zone of interests protected by the statute, 15 U.S.C. § 1063, and it has a reasonable belief in damage proximately caused by the prospective registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), *cert. denied*, ___ U.S. ___ (2021) *cited in Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, * 6 (TTAB 2021).

Applicant acknowledges that this is a low bar to an opposition,²⁴ but argues that Opposer fails to clear this bar because: (i) the notice of opposition fails to plead sufficient facts on this issue, (ii) Opposer admits that it lacks priority by filing its applications on an intent-to-use basis, and (iii) Opposer has not established that it is the real party in interest.²⁵ We disagree.

First, Section 13 of the Trademark Act provides that “Any person who believes that he would be damaged by the registration of a mark upon the principal register, including the registration of any mark which would be likely to cause dilution by blurring or dilution by tarnishment under section 1125(c) of this title, may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefor....” 15 U.S.C. § 1063. Opposer’s notice of opposition claims that Opposer commenced and continued use of the DOUBLE DARE mark from the inception of the children’s game show in 1986 to the commencement of this

²⁴ Applicant’s brief, 42 TTABVUE 13.

²⁵ Applicant’s brief, 42 TTABVUE 13-15.

proceeding; it claims that Applicant's mark so resembles its mark as to be likely to cause confusion or mistake or to deceive, with consequent injury to Opposer and the public; and it claims that Applicant's mark is likely to impair the distinctiveness of its famous DOUBLE DARE mark, causing injury to Opposer.²⁶ Opposer thus pleads facts sufficient to establish a reasonable belief that registration of Applicant's mark would proximately cause damage to its interests, which are in the zone protected by statute. *See, e.g., DeVivo v. Ortiz*, 2020 USPQ2d 10153, *2 (TTAB 2020) ("A claim of likelihood of confusion that 'is not wholly without merit,' including prior use of a confusingly similar mark, may be sufficient 'to establish a reasonable basis for a belief that one is damaged.'" (quoting *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982))).

Second, Opposer's decision to file its applications on an intent-to-use basis does not impair its entitlement to a statutory cause of action. "An intent-to-use applicant is entitled to rely upon actual use, or use analogous to trademark use, prior to the constructive use date of the intent-to-use application." *The Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1635 (TTAB 2007) (citing *Corp. Document Servs. Inc. v. I.C.E.D. Mgmt. Inc.*, 48 USPQ2d 1477 (TTAB 1998) and *Dyneer Corp. v. Auto. Prods. plc*, 37 USPQ2d 1251 (TTAB 1995)). Opposer has accordingly adduced evidence of its actual common law use of DOUBLE DARE in commerce. *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2009 (TTAB 2015) (Opposer's actual use of mark furnishes reasonable basis for belief in damage from registration of applicant's similar mark).

²⁶ Notice of Opposition, ¶¶ 3-17, 26-27, 31-33, 1 TTABVUE 4-7, 9-10.

Third, Opposer has established that it is the real party in interest. It holds four applications for DOUBLE DARE, their registration all potentially blocked by Applicant's subject application.²⁷ See *Chutter, Inc. v. Great Mgmt. Grp.*, 2021 USPQ2d 1001, *11-12 (TTAB 2021); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012) (pending application refused registration based on a likelihood of confusion with mark in respondent's registration shows petitioner has real interest in proceeding, and has standing). It has received cease and desist letters from Applicant. See *Int'l Dairy Foods Ass'n v. Interprofession du Gruyère and Syndicat Interprofessionnel du Gruyère*, 2020 USPQ2d 10892, *11 (TTAB 2020) (citing *Ipcor Corp. v. Blessings Corp.*, 5 USPQ2d 1974, 1976-77 (TTAB 1988) (standing found where applicant sent opposer cease and desist letters)). And it has adduced testimony showing how it controls its wholly owned subsidiaries' use of DOUBLE DARE.²⁸ See *Piano Factory Group, Inc. v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 2021 USPQ2d 913, *10 (Fed. Cir. 2021) (parent company proper party) and *AT&T Mobility LLC v. Thomann and Dormitus Brands LLC*, 2020 USPQ2d 53785, *10 (TTAB 2020) ("The parent corporation of a wholly owned subsidiary 'can reasonably believe that damage to the subsidiary will naturally lead to financial injury to itself.") (quoting *Univ. Oil Prods. Co. v. Rexall Drug & Chem. Co.*, 463 F.2d 1122, 174 USPQ 458, 459 (CCPA 1972)); see also *Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, *11-12

²⁷ See, e.g., Office Action suspending Opposer's Application Ser. No. 87920341 due to the pendency of Applicant's involved Application Ser. No. 87766798. Opposer's Rebuttal NOR, ex. 71, 36 TTABVUE 28-29.

²⁸ Acevedo decl. ¶¶ 4-9, 34 TTABVUE 4-5. Banks decl. ¶¶ 3, 17, 21 TTABVUE 2-3, 8.

(TTAB 2020) (use of a mark by related companies controlled by a corporate parent inures to the benefit of that parent).

Accordingly, Opposer has proven its statutory entitlement to oppose, which extends to all its grounds for opposition. *Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, *7 (TTAB 2021).

III. The Record

The record includes the pleadings and the file of the opposed application. Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b). The parties also introduced the following evidence:

Opposer Viacom

- Notice of reliance containing Applicant's answers to interrogatories; excerpts from deposition of Charles Armstrong, Applicant's president and CEO; media articles covering Opposer's DOUBLE DARE game shows; press release and YouTube screenshot re Opposer's 2016 DOUBLE DARE reunion special; Twitter account tweets and articles re DOUBLE DARE live events; Nickelodeon YouTube playlist; *Board Game Geek* listing re DOUBLE DARE board games; *Nintendo Fandom* post re DOUBLE DARE video game; DOUBLE DARE Facebook page; USPTO records. (25 TTABVUE)
- Rebuttal notice of reliance containing imdb.com printout re parodies of DOUBLE DARE program; McFarlane.com webpage re Doodle Double Dare toy; screenshot showing Applicant's exhibit 17 webpage is unavailable; webpages listing "Double Dare" t-shirts referring to the game show; USPTO records; article re DOUBLE DARE live event; license agreement re DOUBLE DARE apparel; excerpts from deposition of Charles Armstrong. (35 TTABVUE (confidential) 36 TTABVUE)
- Testimonial declaration of Brian Banks, Opposer's Vice President and Executive in Charge of Production for Live Action, with exhibits. (21 TTABVUE. 23 TTABVUE (confidential))
- Testimonial declaration of Thomas Kingsley, Opposer's Director, Nickelodeon Experience, with exhibits. (22 TTABVUE; 24 TTABVUE (confidential))

- Testimonial declaration of Joann Acevedo, Opposer's Vice President of Consumer Products, with exhibits. (33 TTABVUE (confidential) 34 TTABVUE)

Applicant Armstrong

- Notice of reliance containing Opposer's answer to certain interrogatory; excerpts from deposition of Charles Armstrong; exhibits from Opposer's notice of opposition; documents produced and authenticated by Opposer; documents and declarations filed in the parties' SDNY District Court civil action; counsels' correspondence; Internet materials re third-party products and services offered under the words "Double Dare," live event promoted as "90's Nickelodeon Night,"; USPTO records; Viacom's Form 10K referring to "the return of the Nick classic Double Dare"; media articles covering DOUBLE DARE revival, Opposer's lawsuit against The Krusty Crab restaurant, SAG-AFTRA Health Plan Cuts, Cyma Zarghama, President of Nickelodeon Group. (28, 30-31 TTABVUE)
- Second notice of reliance containing media article and study re Opposer, and errata sheet from Summers deposition. (39 TTABVUE)
- Testimonial declaration of Ernie Anastos, former news anchor, re "Mr. Armstrong and I ... pitch[ing] idea of creating new and original television show for children to be called 'Double Dare'" to Fox Television Stations. (29 TTABVUE 1-4)
- Testimonial declaration of Charles Armstrong, Applicant's president and CEO. (29 TTABVUE 5-15)
- Testimonial declaration of Edward M. Bralower, co-executive producer of television series Wonderama. (29 TTABVUE 16-18)
- Testimonial declaration of Dana Calderwood, director, producer and writer on Wonderama, produced by Applicant. (29 TTABVUE 19-25)
- Testimonial declaration of Michael Klinghoffer, former employee of Nickelodeon. (29 TTABVUE 26-28)
- Testimonial deposition of Marc Summers, former host of DOUBLE DARE children's game show. (32 TTABVUE, 39 TTABVUE 10-13).

IV. Evidentiary Objections

Each party has interposed a plethora of objections to the other's evidence. (See Opposer's Appendix to Main Brief, 41 TTABVUE 58-71; Applicant's Appendix to Main Brief, 42 TTABVUE 59-90 (redacted), 43 TTABVUE 59-90 (confidential); Opposer's Reply Brief Appendix, 45 TTABVUE 28-59 (redacted) 44 TTABVUE 28-90 (confidential)). Most of these multiple objections are unnecessary and not well taken, as they seek to exclude evidence that is not outcome-determinative of the merits of the case. Given this fact, coupled with the sheer number of objections, we see no compelling reason to discuss the objections in painstaking detail at this stage. See *AT&T Mobility LLC v. Thomann and Dormitus Brands LLC*, 2020 USPQ2d 53785, *3-4 (TTAB 2020). Our specific rulings on the parties' evidentiary objections are set forth in Appendix A. The vast majority of the objections are overruled. For the most part:

[W]e simply accord the evidence whatever probative value it deserves, if any at all. ... Ultimately, the Board is capable of weighing the relevance and strength or weakness of the objected to testimony and evidence in this specific case, including any inherent limitations. *Hunt Control Sys Inc. v. Koninkijke Philips Elecs N.V. V.*, 98 USPQ2d 1558, 1564 (TTAB 2011). See also *Grote Indus., Inc. v. Truck Lite Co., LLC*, 126 USPQ2d 1197, 1200 (TTAB 2018) ("We also remind the parties that our proceedings are tried before judges not likely to be easily confused or prejudiced. Objections to trial testimony on bases more relevant to jury trials are particularly unnecessary in this forum.") (citing *U.S. Playing Card Co. v. Harbro LLC*, 81 USPQ2d 1537, 1540 (TTAB 2006)); *RxD Media, LLC v. IP Application Development LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018); *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1478 (TTAB 2017) (quoting *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017)). We have kept [the parties'] objections in mind in considering and determining the probative value of [the] evidence.

Spotify AB v. U.S. Software Inc., 2022 USPQ2d 37, *6 (TTAB 2022).

V. Bona Fide Intent to Use

A. Issue Tried by Implied Consent

As noted, Opposer contends in its main brief that the subject application is void ab initio because Applicant lacked a bona fide intent to use the DOUBLE DARE mark on or in connection with its identified goods and services as of its January 23, 2018 filing date.²⁹ Lack of such an intent is a valid basis for opposition. *M.Z. Berger & Co. v. Swatch AG*, 787 F.3d 1368, 114 USPQ2d 1892, 1898 (Fed. Cir. 2015) (affirming *Swatch AG v. M. Z. Berger & Co.*, 108 USPQ2d 1463 (TTAB 2013)).

But since Opposer did not raise this claim in its notice of opposition, we must first determine whether the issue has been tried by implied consent. *Morgan Creek Prods. Inc. v. Foria Int'l Inc.*, 91 USPQ2d 1134, 1138 (TTAB 2009) (“Fed. R. Civ. P. 15(b) provides, in pertinent part, that when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”); *NT-MDT LLC v. Kozodaeva*, 2021 USPQ2d 433, *14 (TTAB 2021) (“Because Petitioner did not seek to further amend its pleading under Fed. R. Civ. P. 15(a) or (b), the nonuse claim must have been tried by express or implied consent under Fed. R. Civ. P. 15(b)(2) for us to consider the claim.”).

Implied consent can only be found where the non-offering party (1) raised no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue. *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 USPQ2d 10914, *3 (TTAB 2020) *aff'd in part, vac. in*

²⁹ Opposer’s brief, 41 TTABVUE 54-57.

part, 2021 USPQ2d 1069 (Fed. Cir. 2021). Applicant’s brief notes that Opposer did not raise this issue in its notice of opposition, but argues that “the submitted evidence is overwhelming that it did and does, in fact, have the requisite intent to make use of the Mark.”³⁰ To support that position, it cites evidence it adduced during trial:

- That “Applicant, and its principal Charles Armstrong, are the producers of the award winning program Wonderama....”³¹
- That “Applicant has contacts and associations in the entertainment industry that allow it to create, market and merchandise programs such as the one it intended and still intends to produce under the Mark....”³²
- That Applicant, through its principal, Charles Armstrong, had discussions or meetings with eleven named individuals to develop, market or promote the show.³³
- That Mr. Armstrong “pitched” the project with potential distributors at Fox Broadcasting and at a meeting of the National Association of Television Programming Executives.³⁴
- That Applicant took steps to develop a so-called “sizzle reel,” that would test the format of the show to be produced under the mark.³⁵

³⁰ Applicant’s brief, 42 TTABVUE 16.

³¹ 42 TTABVUE 16 (citing 25 TTABVUE Ex. 2 at 14:9-16:11, 29 TTABVUE 5 at ¶ 1, 6 at ¶ 14; 32 TTABVUE 67:20-24; 41 TTABVUE 21).

³² 42 TTABVUE 16-17.

³³ 42 TTABVUE 18.

³⁴ 42 TTABVUE 18-19 (citing 29 TTABVUE 6 ¶¶ 15-17; 29 TTABVUE 2 ¶ 2-3 ¶ 6; 28 TTABVUE 84:20-86:17; 29 TTABVUE Exh. 2 at 11-12; 28 TTABVUE 84:20-86:17).

³⁵ 42 TTABVUE 19 (citing 28 TTABVUE Ex. 2 at 85:3-6, 88:12-18, 118:17-25, 41 TTABVUE 46).

Indeed, as Opposer correctly notes, Applicant introduced the testimonial declarations of two witnesses for the sole purpose of establishing, in their identical words, “that there was a genuine intent to create, market, sell and air such a program.”³⁶ And it repeatedly cites the deposition of its principal, Charles Armstrong, claiming that his testimony “[s]hows Applicant’s intent to use Mark and reasons for delaying use” and “[s]hows actions taken regarding Applicant’s intent to use Mark and that others were aware of such intent.”³⁷

In view of the foregoing, we find that Applicant had fair notice of the issue of its bona fide intent, and far from objecting, introduced evidence on the issue and argued the issue in its brief. Therefore:

[E]ven though [Opposer] failed to plead a claim that [Applicant] did not have a right to file the application due to a lack of a bona fide intent to use the ... mark in commerce by himself, such a claim was tried by implied consent because [Applicant] had fair notice of this issue and actively defended against it on the merits.

Hole in One Drinks, Inc. v. Lajtay, 2020 USPQ2d 62534, *8-9. (TTAB 2020).

Opposer’s pleadings are deemed amended accordingly under Fed. R. Civ. P. 15(b). *Id.*; see also *Wet Seal, Inc. v. FD Mgmt.*, 82 USPQ2d at 1632-33 (same). See generally TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 507.03(b) (2021). Applicant is deemed to have denied the allegations of lack of bona fide intent to use. *Societe des Produits Marnier Lapostolle v. Distillerie Moccia S.R.L.*, 10 USPQ2d 1241, 1242 n.4 (TTAB 1989).

³⁶ Declaration of Ernie Anastos, ¶ 6, 29 TTABVUE 3, Declaration of Dana Calderwood, ¶ 14, 29 TTABVUE 20.

³⁷ Applicant’s notice of reliance, 28 TTABVUE 3.

B. Bona Fide Intent to Use

Trademark Act Section 1(b)(1) provides:

A person who has a **bona fide intention, under circumstances showing the good faith of such person**, to use a trademark in commerce may request registration of its trademark on the principal register hereby established by paying the prescribed fee and filing in the Patent and Trademark Office an application and a verified statement, in such form as may be prescribed by the Director.

15 U.S.C. § 1051(b)(1)(emphasis added).

The statute requires objective evidence of an applicant's subjective intent. As McCarthy observes, "Section § 1(b) uses the term 'good faith' twice, once in English, once in Latin. The English term 'good faith' refers to evidence of objective 'circumstances' showing good faith, while the Latin term 'bona fide' refers to the subjective state of mind of the applicant." 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:14 (5th ed. Sept. 2021 update). Thus, "whether an applicant has a bona fide intent to use a mark in commerce is an objective inquiry based on the totality of the circumstances." *Berger v. Swatch*, 114 USPQ2d at 1900. "[T]he applicant's intent must be demonstrable and more than a mere subjective belief." *Id.* at 1898. "Although the evidentiary bar is not high, the circumstances must indicate that the applicant's intent to use the mark was firm and not merely intent to reserve a right in the mark. ... The Board may make such determinations on a case-by-case basis considering the totality of the circumstances." *Id.*

"Opposer has the burden of demonstrating by a preponderance of the evidence that applicant lacked a bona fide intent to use the mark on the identified goods [and services] at the time it filed its application." *Swatch AG v. M. Z. Berger & Co.*, 108 USPQ2d at 1471. It may carry this burden, at least prima facie, by demonstrating

that Applicant lacks documentary evidence of its intent. *Société des Produits Nestlé S.A. v. Cándido Viñuales Taboada*, 2020 USPQ2d 10893, *8 (TTAB 2020).

Opposer contends that is precisely the case here. Applicant “has produced no written plans for its intended use of that mark.”³⁸ “Nowhere does [Applicant] Armstrong contest one crucial fact, there are no documents of any kind – emails, business plans, or anything else – showing its purported plan to use DOUBLE DARE with the goods and services identified in the Armstrong Application.”³⁹ In answer to Opposer’s interrogatory number 3 requiring Applicant to “Describe all business plans concerning the use of Applicant’s Mark in connection with each of Applicant’s Goods and Services,” Applicant responds that “Applicant did not prepare a business plan under Applicant’s Mark.”⁴⁰ At the deposition of Applicant’s principal, Charles Armstrong, he admitted under questioning:

Q. Had you already started filming?

A. We had not started filming yet, no.

Q. Had you written any episodes?

...

... We had not written any specific episodes.

...

Q. In January 2018, had you written any promotional materials for Double Dare?

A. We had put together a plan to launch the show. I’m not quite sure what “promotional materials” means, but if you’re asking if we put anything out to the press, the answer is

³⁸ Opposer’s brief, 41 TTABVUE 56.

³⁹ Opposer’s reply brief, 45 TTABVUE 25.

⁴⁰ Applicant’s Answer to Int. No. 3, 25 TTABVUE 37.

absolutely no.⁴¹

Armstrong initially testified that he and others had written an outline for a “sizzle reel” to show to prospective broadcasters. (In entertainment industry parlance, a “sizzle reel” is not a full pilot; it is a minutes-long “short, usually flashy video used to promote a product, service, proposed project....”)⁴² He was questioned about it:

Q. At this point, January 12, 2018, had you started work on the sizzle reel?

A. We had written an outline at a December meeting that we all had together.

Q. Were you saying December of 2017?

A. Yes.⁴³

But he later recanted this testimony:

THE WITNESS: I didn't say that there was a written outline. I said we outlined it at the meeting. That's what we said. We came up with this is what we're going to do. It should be reflected in the communications that you've got. It's called a brainstorming meeting.

BY MR. HANSEN:

Q. To my recollection, you did say we had a written outline at a December meeting.

A. Well, then I misspoke. We outlined it at the meeting. I apologize.

Q. There's nothing in writing from the meeting?

A. I have -- like I said, everything that we have, you have.

Q. The outline included, you said, a

⁴¹ Armstrong dep. 90:4-91:11, 36 TTABVUE 59-60.

⁴² Merriam-Webster.com, 11/24/2021. “The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).” *Int'l Dairy Foods Ass'n v. Interprofession du Gruyère and Syndicat Interprofessionnel du Gruyère*, 2020 USPQ2d 10892, at *17 n.115.

⁴³ Armstrong dep. 89: 14-22, 36 TTABVUE 58.

brainstorming about games; is that right?

A. No, I didn't say that.

Q. What did the outline include?

A. I said that we outlined a plan to create a show.

You keep referring to an outline, but I'm saying we got together to talk about creating a game show.⁴⁴

Q.... At this point, in January 12, 2018, had you decided what the exact contents of the sizzle reel would be?

A. No.

Q. Had you started working on any of the crops or content required for the sizzle reel?

A. No.⁴⁵

We find that Opposer has made out a prima facie case by showing that Applicant has no documentary evidence to support its claimed bona fide intent to use the mark in commerce as of the application filing date. *A&H Sportswear Co., Inc. v. Yedor*, 2019 USPQ2d 111513, *3 (TTAB 2019); *Swiss Grill v. Wolf Steel*, 115 USPQ2d at 2009. Applicant had no business plan, no scripts, no press releases, no other promotional materials, no films, and no written outline for the show, much less a sizzle reel.

The absence of documentary evidence, however, must be considered in the context of the evidentiary record as a whole. *Nestlé v. Taboada*, 2020 USPQ2d 10893, at *8-9. Applicant may counter Opposer's prima facie case with facts that adequately explain or outweigh its failure to provide documentary evidence. *A&H Sportswear v. Yedor*, 2019 USPQ2d 111513, at *3.

⁴⁴ Armstrong dep. 90:4-91:11, 36 TTABVUE 59-60.

⁴⁵ Armstrong dep. 91:24-92:5, 36 TTABVUE 60-61.

Armstrong testified that, “[I]n January the first thing I did was apply for a Double Dare trademark.”⁴⁶ But Applicant’s mere act of filing its intent-to-use application is insufficient to establish its bona fide intent to use the DOUBLE DARE mark on or in connection with the goods and services identified in its application. *Nestlé v. Taboada*, 2020 USPQ2d 10893, at *11-12.

Armstrong, testifying as Applicant’s principal, asserted a subjective intent to use the mark in commerce:

Q. In January 2018, what was your plan for Double Dare?

A. To produce a television program.⁴⁷

Applicant further asserted, in answer to one of Opposer’s interrogatories:

Applicant has neither marketed, sold and/or distribute[d] nor is currently marketing, selling and/or distributing, any goods or services in the United States in association with Applicant’s Mark. It is Applicant’s intention to market, sell and or distribute a continuing children’s show, and/or segments thereof, broadcast over television, cable televi[s]ion and the internet, clothing, toys, games, playthings and related items, and interactive entertainment software and related items, as well as arranging and conducting live, interactive, game shows online and via mobile applications.⁴⁸

These assertions fail because evidence bearing on bona fide intent:

[I]s “objective” in the sense that it is evidence in the form of real life facts and by the actions of the applicant, not by the applicant’s testimony as to its subjective state of mind. That is, Congress did not intend the issue to be resolved simply by an officer of applicant later testifying, “Yes, indeed, at the time we filed that application, I did truly intend to use the mark at some time in the future.”

L’Oreal S.A. and L’Oreal USA, Inc., v. Marcon, 102 USPQ2d 1434, 1444 (TTAB 2012) (quoting MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, 19:14 (4th ed. 2009));

⁴⁶ Armstrong dep. 92:20-25, 36 TTABVUE 61.

⁴⁷ Armstrong dep. 47:7-9, 28 TTABVUE 63.

⁴⁸ Applicant’s Answer to Opposer’s Interrogatory No. 1, Opposer’s NOR, 25 TTABVUE 36.

see also Saul Zaentz Co. v. Bumb, 95 USPQ2d 1723, 1726-27 (TTAB 2010).

Applicant presents **no** persuasive evidence of a bona fide intent to use DOUBLE DARE on its identified goods in Classes 9, 25, and 28—goods such as computer game programs, clothing, and toys. *See Lane Ltd. v. Jackson Int’l Trading Co.*, 33 USPQ2d 1351, 1355-56 (TTAB 1994) (applying for more products than applicant is likely to introduce under the applied-for mark “may cast doubt on the bona fide nature of the intent or even disprove it entirely” according to the legislative history of the Trademark Law Revision Act of 1988 (the TLRA), which instituted applications based on bona fide intent). Applicant fails to overcome Opposer’s prima facie case as to these classes of goods.

However, the issue of bona fide intent is closer as to Applicant’s Class 41 services: “entertainment, namely, a continuing children’s show, and segments thereof; broadcast over television and the internet.”

An applicant’s demonstrated capacity to produce and market its identified goods or services can rebut its lack of documentary evidence. *Monster Energy Co. v. Tom & Martha LLC*, 2021 USPQ2d 1197, *9 (TTAB 2021); *Nestlé v. Taboada*, 2020 USPQ2d 10893, at *12; *Wet Seal, Inc. v. FD Mgmt.*, 82 USPQ2d at 1643. In this case, Armstrong declares that “I am the president of applicant Armstrong Interactive, Inc., and producer of the award winning television series Wonderama.”⁴⁹ He explains: “Wonderama is a children’s program that I started in production in 2016 and went on the air in December of 2016. It continues on the air to today.”⁵⁰ One of the producers

⁴⁹ Armstrong decl. ¶1, 29 TTABVUE 5.

⁵⁰ Armstrong dep. 45:20-25, 25 TTABVUE 66, 28 TTABVUE 66.

of WONDERAMA, Dana Calderwood, was a director of the 1980's DOUBLE DARE program.⁵¹

Armstrong declares that he began to formulate the intent to use the DOUBLE DARE mark when the original host of the DOUBLE DARE children's show, Marc Summers, appeared as a guest on WONDERAMA, spoke with the show's producer, Dana Calderwood,⁵² then came to Armstrong's offices:

2. On August 29th, 2017, Marc Summers came to visit me in my offices.
3. During this meeting, Mr. Summers stated that he had just come from a meeting with Cyma Zarghami, the CEO of Nickelodeon.
4. Mr. Summers told me, in the presence of Edward Bralower, that Ms. Zarghami had told him that Viacom had no interest at all in Double Dare, that both he and Double Dare were too old, and that Nickelodeon would not be putting either of them on the air.
- ...
6. During my meeting with Marc, I checked the U.S.P.T.O. trademark base and found that Viacom's registrations relating to Double Dare had all expired.
7. To the best of my knowledge, Double Dare was not then being aired by Viacom.
8. In view of this information, Mr. Summers and I discussed the possibility of creating a new and original program, that would utilize the mark Double Dare....⁵³

Mr. Armstrong elaborated at his deposition:

Q. When you say "a new show," are you meaning the show that you intend to use the Double Dare mark on, or is this a different show?

A. It was all - - it was the game show with Marc as the host. Our intent was to create a

⁵¹ Calderwood decl. ¶¶ 1-2, 29 TTABVUE 19.

⁵² See Summers dep. 67:16-24, 32 TTABVUE 68.

⁵³ Armstrong decl. ¶¶ 2-4, 6-8, 29 TTABVUE 5-6. See also Armstrong dep. 57:15-25, 58:3-9, 25 TTABVUE 71, 28 TTABVUE 68.

Double Dare with him as the host, but at that point we didn't have a name for the show because I had not obtained anything, and I was still trying to determine if I wanted to do business with this man.

Q. Okay. So did you - - did you and Marc continue working towards his new show?

A. Yes, we did.⁵⁴

...

Q. But if your goal was to create something original, why call it Double Dare?

A. That was my choice.

Q. Why did you make that choice?

A. Because I was brought the idea by Marc Summers.⁵⁵

Edward Bralower, Co-Executive Producer of WONDERAMA, corroborates Armstrong's account, declaring in pertinent part that he sat in on the August 29, 2017 meeting between Armstrong and Summers, and that:

7. Mr. Armstrong checked the Trademark Office's database and found that Viacom's registration for the mark had expired.

8. There was then, in my presence, a discussion between Mr. Armstrong and Mr. Summers concerning creating a new program with the title Double Dare.⁵⁶

The next month, Applicant, acting through intermediaries, began to pitch the DOUBLE DARE show to potential broadcasters. Ernie Anastos, former news anchor for the Fox Television Affiliate in New York City, declares that:

2. In or about September 19, 2017, on behalf of Armstrong Interactive, Inc. ("AI"), I spoke with Dan Carlin at Fox5, the Fox Broadcasting affiliate in

⁵⁴ Armstrong dep. 60:3-16, 25 TTABVUE 74.

⁵⁵ Armstrong dep. 173:3-8, 25 TTABVUE 100.

⁵⁶ Bralower decl. ¶¶ 1-8, 29 TTABVUE 16-17.

New York City, about AI's desire to create a new, original children's television program to be called "Double Dare."

3. Mr. Carlin was kind enough to suggest that Mr. Armstrong and I pitch the show to Frank Cicha, head of programming for Fox Television Stations.

4. Subsequently, Mr. Armstrong and I did pitch the idea of creating a new and original television program for children to be called "Double Dare."

5. Mr. Cicha expressed interest in Fox obtaining rights to our proposed program.

6. I participated in meetings and discussions concerning this project and know, from firsthand knowledge, that there was a genuine intent to create, market, sell and air such a program.⁵⁷

WONDERAMA producer Dana Calderwood, who introduced Marc Summers to Mr. Armstrong, similarly avers that:

13. In 2017, I worked with Charles Armstrong of Armstrong International, Inc. to create a new and original game show aimed at children which would be produced and marketed under the trademark "Double Dare."

14. I participated in meetings and discussions concerning this project and know, from first hand knowledge, that there was a genuine intent to create, market, sell and air such a program.⁵⁸

Mr. Armstrong testified that he did not personally meet with or call Frank Cicha, Director of programming for Fox owned and operated stations, in January 2018, the month Applicant filed the subject application to register DOUBLE DARE.⁵⁹ He testified, rather, that an intermediary, Bill Carroll, met with Frank Cicha at the

⁵⁷ Anastos decl. ¶¶ 1-6, 29 TTABVUE 2-3, 31 TTABVUE 8-9. Mr. Armstrong, Applicant's president and CEO, declares that "[o]n or about September 19, 2017, Ernie Anastos and I met with Frank Cicha of Fox Networks to pitch them on the idea of a new and original Double Dare, including Mark Summers as part of the program." Armstrong decl. ¶ 15, 29 TTABVUE 6. This date is inconsistent with the Anastos declaration, which is more likely to be accurate, given that the contact with Mr. Chicha appears to have taken place later, through another intermediary, Mr. Carroll.

⁵⁸ Calderwood decl. ¶¶ 1-2, 13-14, 29 TTABVUE 19-20.

⁵⁹ Armstrong dep. 85:2-18, 28 TTABVUE 79.

National Association of Television Producers and Executives (NATPE) meeting held in Miami in early January. Armstrong and Carroll exchanged emails:

On 1/12/18, 4:40 PM, "Bill carroll" <bc Carroll455@gmail.com> wrote:

Chuck,

I will pass the word along to Frank if I get the chance to talk with him at NATPE.

Bill

Sent from my iPad

> On Jan 12, 2018, at 3:09 PM, Charles Armstrong <carmstrong@armstronginteractiveinc.com> wrote:
>
> Tell him we are in progress with the Marc Summers project.
>
> And thank him in advance for clearing Wonderama :)
> --
>
> Armstrong InterActive, Inc.
> 271 Madison Avenue
> 20th Floor
> New York, New York, 10016
> (212) 382-2044 ext 210
> (917) 359-0299 int'l cell
> carmstrong@armstronginteractiveinc.com

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According to Armstrong:

- A. We referred to it as the Marc Summers project on email, but he referred to it as NATPE within as Double Dare because we were in the process of applying for it.⁶¹

Armstrong further testified:

A. Bill met with Frank, discussed Wonderama and Double Dare.

Q. Do you know what the outcome of the discussion was as it relates to Double Dare?

A. That we were working on the project and were going to shoot a sizzle reel in the summer.⁶²

Marc Summers testified at his deposition that that he had a conversation with Armstrong about bringing the DOUBLE DARE show back, but that the show they

⁶⁰ Armstrong decl. ex. 2, 29 TTABVUE 12.

⁶¹ Armstrong dep. 86:14-17, 28 TTABVUE 80.

⁶² Armstrong dep. 86:2-7, 28 TTABVUE 80.

worked on was called “Messed Up.”⁶³ Opposer echoes this testimony and Armstrong’s email, quoted above, noting that:

The only work product that Mr. Armstrong testified shows its intent to create a DOUBLE DARE program is a “sizzle reel” that Armstrong produced in July 2018 and planned to present to Frank Chica, an executive from the Fox Network. ... However, in the sizzle reel, Armstrong called its game show MESSED UP, not DOUBLE DARE. ... And Armstrong presented the program to Fox as “the Marc Summers project,” a “holding name” Armstrong used in lieu of DOUBLE DARE.⁶⁴

Because Armstrong began working on this sizzle reel in July 2018, nearly seven months after it filed the Armstrong Application, this reel does not show that Armstrong had the requisite bona fide intent at the time the application [was] filed.⁶⁵

That, however, is sufficiently contemporaneous with Applicant’s January 2018 filing to indicate bona fide intent. *Swatch v. Berger*, 108 USPQ2d at 1474 (seven months after trademark application sufficiently contemporaneous to bear on bona fide intent). “[E]vidence of post-application activities, if sufficiently contemporaneous, can be probative of intent at the time of application.” 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:14. Applicant may have used the working title “Messed Up,” but given the parties’ exchange of threatening cease and desist letters in May 2018, followed by Opposer’s premature resort to a civil action in June of that year, Applicant’s use of a working title in July may have been the better part of valor.⁶⁶ See *Wirecard AG v. Striatum Ventures B.V.*, 2020 USPQ2d 10086, *9 (TTAB

⁶³ Summers dep. 50:18-51:4, 32 TTABVUE 51-52.

⁶⁴ Opposer’s brief, 41 TTABVUE 56.

⁶⁵ Opposer’s brief, 41 TTABVUE 56 n. 26.

⁶⁶ See Applicant’s brief, 42 TTABVUE 18 (Messed Up “was used due to the on-going dispute with Opposer as to the rights to Mark, and Applicant’s reasonable fear of suit. While the use of ‘Messed Up’ is not a use of the Mark, it is a part of Applicant’s intent to make use of the Mark”).

2020) (quoting *Ralston Purina Co. v. On-Cor Frozen Foods, Inc.*, 746 F.2d 801, 223 USPQ 979, 982 n. 6 (Fed. Cir. 1984) (“[I]t was only prudent for Ralston to refrain from use of its mark following ON-COR’s filing of its opposition....”)).

Opposer reminds us that the District Court, dismissing Opposer’s declaratory action for lack of subject matter jurisdiction, noted that Applicant had not “taken meaningful steps to prepare for use of the marks in commerce,” and dismissed the case given the “substantial uncertainty surrounding when, if ever, Armstrong will acquire such rights” in DOUBLE DARE.⁶⁷ But the parties’ present opposition proceeding presents a different procedural posture, for the parties have had the opportunity to adduce evidence at trial.

Opposer characterizes Applicant’s stance as hopeful or wishful thinking, not bona fide intent to use the DOUBLE DARE MARK. As Armstrong testified:

Q. At this point you hadn’t decided on the actual title being Double Dare, correct?

A. It was our intent and Marc’s hope and dream that we would produce that show together. It was in process.⁶⁸

...

Q. It was always your intent to use Double Dare as the name of the game show?

A. Yeah, I mean, that was our hope. And we had not at that point yet applied for it, nor had we been granted the permission to use it.⁶⁹

⁶⁷ Opposer’s reply brief, 45 TTABVUE 25 (quoting *Viacom Int’l Inc. v. Armstrong Interactive, Inc. and Charles Armstrong*, 2019 USPQ2d 308465, at *8-9).

⁶⁸ Armstrong dep. 75:12-16, 28 TTABVUE 73.

⁶⁹ Armstrong dep. 77:16-21, 25 TTABVUE 75, 28 TTABVUE 75.

The evidence shows, however that Applicant successfully adopted the abandoned WONDERAMA mark and has used it in connection with producing and airing a children’s television program. It had the experience and personnel needed to produce the DOUBLE DARE children’s show. And it had, for a while, the original host of DOUBLE DARE cooperating in the project. It undertook successive efforts to set the project in motion, through pitches with broadcasters and creation of a sizzle reel. Some of the testimony is conclusory, such as the Anastos and Calderwood averments that “I participated in meetings and discussions concerning the project and know, from first hand knowledge, that there was a genuine intent to create, market, sell and air such a program.”⁷⁰ But the conclusions are prefaced with more specific background information about the experience of the declarants and their efforts to pitch the DOUBLE DARE show. Armstrong’s testimony about these efforts suffers from some inconsistencies, such as the creation of an outline for the new program or the date Applicant pitched the new program to Frank Cicha of Fox Networks.

Armstrong’s testimony also relies to some extent on statements made by others—for example, his accounts of Marc Summers’s conversation with the CEO of Nickelodeon, or Robert Carroll’s pitch to Mr. Cicha in January 2018.⁷¹ But those statements are considered, not for the truth of the matter asserted in the statements, but for their effect on Armstrong’s intentions, so they are not hearsay. Fed. R. Evid. 801(c). Wright and Miller explain that “an out-of-court statement is not hearsay if the witness is reporting what he heard someone else tell him for the purpose of explaining

⁷⁰ Anastos decl., ¶ 6, 29 TTABVUE 3. *See also* Calderwood decl., ¶ 14, 29 TTABVUE 20, with the same language.

⁷¹ Armstrong dep. 86:2-7, 28 TTABVUE 80.

what the witness was thinking, at the time or what motivated him to do something.”

30B Wright & Miller, FED. PRAC. & PROC. EVID. § 6719 (2021 ed.) (internal punctuation omitted). For example:

A statement that D made a statement to X is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in X, such as receiving notice or having knowledge or motive, or to show the information which X had as bearing on the reasonableness, **good faith**, or voluntariness of subsequent conduct

2 MCCORMICK ON EVID. § 249 (8th ed. Jan. 2020 update) (emphasis added).

Consequently, the testimony, taken as a whole, indicates that Armstrong had more than subjective hopeful or wishful thinking. He had reason to believe that DOUBLE DARE was available, that it was no longer registered, and that Applicant could produce and air the show with the expertise of its former producer and host. Applicant’s contemporaneous actions from August 2017 through July 2018 are consistent with that mental impression and intention. Considering the totality of the circumstances, the low evidentiary bar, and the objective evidence as it bears on Applicant’s subjective intent, this suffices to overcome Opposer’s prima facie case based on lack of documentation.

C. Conclusion

We find, based on a preponderance of the evidence, that Applicant lacked a bona fide intent to use the applied-for mark on its identified goods in Classes 9, 25, and 28 at the time it filed its application. *See Swatch v. Berger*, 108 USPQ2d at 1471. The opposition is sustained on this ground as to the goods in these classes. *See Monster Energy v. Tom & Martha*, 2021 USPQ2d at *12 (“Consideration of the pertinent case law makes clear that if a lack of bona fide intent is found as to some but not all of the

goods or services, the former would be subject to deletion from the application, but absent proof of fraud, the application, or relevant class, would not be considered void in its entirety”) (citing *Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1943 (TTAB 2013) (“In accordance with the evidence of record, and following close of the appeal period, the identification of goods in applicant’s application will be amended to reflect those goods with which it has a bona fide intent to use the mark....”)).

Opposer, however, has not carried its burden of proving by a preponderance of the evidence that Applicant lacked a bona fide intent to use the applied-for mark in connection with its recited Class 41 entertainment services at the time it filed its application. 15 U.S.C. § 1051(b). *Berger v. Swatch*, 114 USPQ2d at 1900. Our analysis under Section 2(d) accordingly focuses on these services.

VI. Priority and Likelihood of Confusion

The Trademark Act permits an opposer to file an opposition based on its ownership of a mark “previously used in the United States” and “not abandoned.” 15 U.S.C. §§ 1052(d), 1063, 1064. Here, the parties agree that the key issue is priority.⁷² Where, as here, the parties are direct competitors, the marks are identical, and the goods and services—entertainment services and ancillary goods—are identical, legally identical, or closely related, likelihood of confusion is a given, and the party with priority prevails. “Accordingly, we will focus our attention, as the parties have

⁷² Applicant’s brief, 42 TTABVUE 6 (“This opposition is about priority. The only substantive issue for this tribunal to decide is which of the two parties before it has priority to the mark ‘Double Dare’ (the ‘Mark’). The parties are in agreement on this point....”). Opposer’s reply brief, 45 TTABVUE 10 (“Given Armstrong’s implicit acknowledgement that confusion and dilution are likely if the Armstrong Application were to be allowed, the parties agree that the core issues in this case are priority and abandonment.”).

done, on the issue of priority and the effect of Opposer's alleged abandonment, if any, on this issue." *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1483 (TTAB 2017).

A. Priority and Abandonment Law

In order to prevail on its Section 2(d) claim, Opposer must establish that it has priority of use over Applicant. *Id.* Because its registrations have been cancelled, Opposer no longer benefits from the presumptions of Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), and it must show, by a preponderance of the evidence, that it has common law rights prior to Applicant's January 23, 2018 constructive use filing date. *Hydro-Dynamics Inc. v. George Putnam & Co. Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *3; *Kemi Organics v. Gupta*, 126 USPQ2d 1601, 1605-06 (TTAB 2018); *Zirco Corp. v. Am. Tel. and Tel. Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991) ("[T]here can be no doubt but that the right to rely upon the constructive use date comes into existence with the filing of the intent-to-use application and that an intent-to-use applicant can rely upon this date in an opposition brought by a third party asserting common law rights.").

As Applicant acknowledges, the cable television show "Double Dare" premiered on October 6, 1986 on the Nickelodeon network ("Legacy Double Dare").... It was produced between 1986 and 2000, in a variety of formats.... New episodes of Legacy Double Dare ceased being produced in 2000....⁷³ Reruns followed.⁷⁴

⁷³ Applicant's brief, pp. 5-6, 42 TTABVUE 10-11. Although Applicant questions the provenance of the DOUBLE DARE television show, Opposer has established, and we have found by a preponderance of the evidence, that it was produced and broadcast by subsidiaries of Opposer, to which the rights inure. Acevedo decl. ¶¶ 4-9, 34 TTABVUE 4-5; Banks decl. ¶¶ 3, 17.

⁷⁴ As Applicant admits, "In each of 2001 and 2002 [DOUBLE DARE] aired roughly 2,000 times. In 2003 through 2005, it aired roughly 1,400, 1,900, and 1,600 time respectively. In

Applicant maintains, however, that “Between 2009 and 2018, little to no bona fide use of the Mark in commerce was made by Opposer or anyone else.”⁷⁵ That is the gravamen of Applicant’s defense. “[W]hen a mark is abandoned, as Applicant claims in this case, it becomes available for others to adopt and use as a trademark.” *Azeka Bldg. v. Azeka*, 122 USPQ2d at 1483.

Under Section 45 of the Trademark Act, a mark shall be deemed to be abandoned:

- (1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. “Use” of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.

15 U.S.C. § 1127.

There are two elements to a nonuse abandonment claim: (1) use of the mark has been discontinued (2) with intent not to resume such use. *Peterson v. Awshucks*, 2020 USPQ2d 11526, at *9. Proof of these elements is a matter of fact, not speculation. *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1310 (Fed. Cir. 1989); 1310; *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, 126 USPQ2d 1526, 1532-33 (TTAB 2018).

If a defendant raising abandonment as an affirmative defense can show three consecutive years of nonuse, it establishes a prima facie showing of abandonment, creating a rebuttable presumption that the mark was abandoned with intent not to resume use. This statutory presumption applies equally to common law and registered marks. *Miller Brewing Co. v. Oland’s Breweries [1971] Limited*, 548 F.2d

each of 2006, 2007 and 2008, it aired approximately 730 times.” Applicant’s brief, 42 TTABVUE 25.

⁷⁵ Applicant’s brief, p. 6, 42 TTABVUE 11.

349, 192 USPQ 266, 267 (CCPA 1976); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1024 (TTAB 2009); *Hornby v. Tjx Cos., Inc.*, 87 USPQ2d 1411, 1421 (TTAB 2008). The burden of production (i.e., going forward) then shifts to the plaintiff to produce evidence that it has either used the mark or that it has intended to resume use. The burden of persuasion remains with the defendant—the party attempting to prove abandonment by a preponderance of the evidence. *See Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390, 1393 (Fed. Cir. 1990); *Cerveceria Centroamericana v. Cerveceria India*, 13 USPQ2d at 1312 n.6; *Peterson v. Awshucks* 2020 USPQ2d 11526, at *9. If the defendant does not prove three consecutive years of nonuse, it must prove both elements without the aid of a presumption—that is, that the plaintiff discontinued use of its mark with intent not to resume such use. *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, *15 (TTAB 2019).

In addition to **nonuse**, a party can also show abandonment by **misuse** of a mark. Under Section 45, a mark shall also be deemed to be abandoned:

- (2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph.

15 U.S.C. § 1127.

Applicant contends that Opposer has abandoned DOUBLE DARE through nonuse and misuse, thereby negating Opposer's claim of priority and freeing up the mark for Applicant's adoption and use. *See Azeka Bldg. v. Azeka*, 122 USPQ2d at 1485.

“We therefore must address the abandonment defense to determine which party has priority.” *Executive Coach Builders, Inc. v. SPV Coach Co., Inc.*, 123 USPQ2d 1175, 1180 (TTAB 2017).

B. Nonuse Abandonment

1. Burden of Proof

Applicant argues that “Opposer has not, and cannot, meet its evidentiary burden so as to prove it has made continuous use of the Mark.”⁷⁶ It notes that Opposer’s former DOUBLE DARE registration for “production and distribution of a children’s game show television program” was, like its other former registrations, cancelled due to Opposer’s failure to renew it in 2009.⁷⁷ It argues that “Opposer’s intent to use filings are admissions of Opposer’s nonuse of the Mark. ... Opposer’s efforts to now deny its previously sworn statement of non-use creates for it a heavy evidentiary burden.”⁷⁸

However, “[t]he governing statute does not speak of ‘continuous use,’ but rather of whether the mark or trade name has been ‘previously used in the United States by another and not abandoned.’” *W. Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1665 (Fed. Cir. 1994) (citing Section 2(d)) *quoted in Kemi Organics v. Gupta*, 126 USPQ2d at 1607. Even if a registration is cancelled, the underlying common law rights in a mark can continue. *Crash Dummy Movie, LLC v. Mattel, Inc.*, 601 F.3d 1387, 94 USPQ2d 1315, 1317 (Fed. Cir. 2010) (“[C]ancellation of a

⁷⁶ Applicant’s brief, 42 TTABVUE 6.

⁷⁷ Applicant’s brief, 42 TTABVUE 26.

⁷⁸ Applicant’s brief, 42 TTABVUE 21. *See also* 42 TTABVUE 6, 14, 22, 26.

trademark registration does not necessarily translate into abandonment of common law trademark rights.”) *quoted in Kemi Organics v. Gupta*, 126 USPQ2d at 1609 (“The fact that Petitioner’s several past registrations were cancelled under Section 8 of the Trademark Act does not permit us to infer that the registered marks were abandoned.”). Opposer can rely on its actual use prior to the constructive use date of its intent-to use application under Section 1(b). 15 U.S.C. § 1051(b). *Wet Seal v. FD Mgmt.*, 82 USPQ2d at 1635. It need not meet the enhanced burden of proof imposed on a party who claims to have made actual use of a mark earlier than the date claimed in its Section 1(a) application, 15 U.S.C. § 1051(a). *See NT-MDT LLC v. Kozodaeva*, 2021 USPQ2d 433, at *16-17; *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1102 n.38 (TTAB 2019).

2. The Parties’ Arguments

Applicant does not dispute that Opposer aired the DOUBLE DARE programs up through 2008,⁷⁹ but contends that “[b]etween 2009 and 2018, little to no bona fide use of the Mark in commerce was made by Opposer or anyone else.”⁸⁰ Applicant seeks to divide and conquer Opposer’s evidence of use, parsing each shred of evidence under each separate International Class.⁸¹ For example, Applicant argues that “[s]tarting in 2009, Opposer ceased making bona fide use of the Mark in class 41 [entertainment services].”⁸² An “indicator of normal industry practice available to us is Opposer’s own

⁷⁹ Applicant’s brief, 42 TTABVUE 10-11, 25. (“In each of 2001 and 2002 [DOUBLE DARE] aired roughly 2,000 times. In 2003 through 2005, it aired roughly 1,400, 1,900, and 1,600 time respectively. In each of 2006, 2007 and 2008, it aired approximately 730 times.”).

⁸⁰ Applicant’s brief, p. 6, 42 TTABVUE 11.

⁸¹ *See* Applicant’s brief, 42 TTABVUE 15-50.

⁸² Applicant’s brief, 42 TTABVUE 25.

practices over the years,” Applicant states.⁸³ From 1999 through 2005, DOUBLE DARE aired over a thousand times per year; and from 2006 through 2008, hundreds of times per year.⁸⁴ But that number dwindled in the years that followed, Applicant argues:

[In 2009] Double Dare was aired only 10 times. It did not air at all in 2010 and only once in 2011. There were three airings in 2012, a single airing in 2013, and none in 2014. There were 7 showings in 2015. In 2016, ... Double Dare was broadcast 20 times....⁸⁵

Applicant concludes that “This sporadic, transitory use of the Mark with regards to television programming, purportedly by Opposer, does not rise to the level of bona fide use in commerce. This is borne out both in the testimony of Marc Summers....”⁸⁶ In its heyday, host Marc Summers testified, DOUBLE DARE began as a “strip program,” airing Monday through Friday. “When the ratings came in and we were doing so well, there was also a weekend version.”⁸⁷ Applicant’s counsel asked him:

Q. - - would it be common industry practice for that show to, in a three-year period, run a total of two times?
A. You mean only twice?

⁸³ Citing *Automedx, Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1981 (TTAB 2010) (“The legislative history of the Trademark Law Revision Act reveals that the purpose of the amendment was to eliminate ‘token use’ as a basis for registration, and that the new, stricter standard contemplates instead commercial use of the type common to the particular industry in question.”).

⁸⁴ Applicant’s brief, 42 TTABVUE 11, 22-23, 25.

⁸⁵ Applicant’s brief, 42 TTABVUE 25 (citing figures Opposer submitted in the District Court action, Applicant’s NOR ex. 7, 28 TTABVUE 1021-24). Applicant refers to the original Double Dare, Family Double Dare, and Double Dare 2000 programs as “Legacy Double Dare.” 42 TTABVUE 10-11. Since the shows’ formats and rules remained essentially the same over the years, we refer to that programming, as well as subsequent programming, collectively as DOUBLE DARE.

⁸⁶ Applicant’s brief, 42 TTABVUE 11, 22-23, 25.

⁸⁷ Summers dep. 14:10-15:1, 32 TTABVUE 15-16.

Q. Yes, I mean only twice.

A. No, of course not. That's ridiculous.⁸⁸

Applicant also contends that Mr. Summers's attempts to persuade Nickelodeon to resume DOUBLE DARE television programming were repeatedly rebuffed.⁸⁹ In this regard, we do not consider Mr. Armstrong's declaration about his August 29, 2017 meeting with Mr. Summers⁹⁰ for the truth of the matter asserted, as those statements are, in Opposer's words, "rank hearsay."⁹¹ Fed. R. Evid. 801(c), 802. We do, however, consider Mr. Summers's deposition testimony, which is more enlightening:

[F]rom the time Double Dare 2000 ended, I'm sure that I was relentless in telling them [Nickelodeon executives] they should bring it back, but bring it back the right way.⁹²

Q. So is that an accurate statement, that you had been pushing them for years to bring back the show?

A. Yeah, absolutely.

Q. And up until 2018, they did not do so; is that correct?

A. As far as I know, they didn't. I'm totally unaware.⁹³

Applicant concludes that Opposer discontinued use of DOUBLE DARE for Class 41 entertainment services after 2009, with intent not to resume use.⁹⁴

⁸⁸ Summers dep. 15:24-16:11, 32 TTABVUE 16-17.

⁸⁹ Applicant's brief, 42 TTABVUE 28.

⁹⁰ "During this meeting, Mr. Summers stated that he had just come from a meeting with Cyma Zarghami, the CEO of Nickelodeon. Mr. Summers told me, in the presence of Edward Bralower, that Ms. Zarghami had told him that Viacom had no interest at all in Double Dare, that both he and Double Dare were too old, and that Nickelodeon would not be putting either of them on the air." Armstrong decl. ¶¶ 3-4, 29 TTABVUE 5-6.

⁹¹ Opposer's brief, 41 TTABVUE 40.

⁹² Summers dep. 20:17-21, 32 TTABVUE 21.

⁹³ Summers dep., 28:1-6, 32 TTABVUE 29. *See also* Klinghoffer decl. ¶¶ 6-10, 29 TTABVUE 26-27 (2013 pitch to Spike TV, sister network to Nickelodeon, to revive DOUBLE DARE rejected.)

⁹⁴ Applicant's brief, 42 TTABVUE 32.

Opposer contends that it used the DOUBLE DARE Mark continuously between 2009 and 2018 in a variety of overlapping ways: (i) reruns of old DOUBLE DARE episodes that aired on Nickelodeon and other Viacom channels; (ii) live DOUBLE DARE events, beginning in 2012, that took place around the country; (iii) digital downloads of DOUBLE DARE rerun episodes, offered from 2014 onward, that tens of thousands of consumers downloaded and streamed; (iv) 2016 live and on-air reunion specials that were a substantial ratings success, persuading Opposer to (v) produce a 2018 reboot of DOUBLE DARE with new content; all promoted by (vi) extensive social media advertising.⁹⁵

3. Discussion

“It is not the law that ‘the slightest cessation of use causes a trademark to roll free, like a fumbled football, so that it may be pounced on by any alert opponent.’” 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:14 (quoting *Cont’l Distilling Corp. v. Old Charter Distillery Co.*, 188 F.2d 614, 87 USPQ 365, 369 (D.C. Cir. 1950)). “Nonuse” of a mark for abandonment purposes means “no bona fide use of the mark made in the ordinary course of trade,” and this is to be interpreted with flexibility to encompass a variety of commercial uses. *Double Coin v. Tru Dev.*, 2019 USPQ2d 377409 at *11 (citing *Lewis Silkin LLP v. Firebrand LLC*, 129 USPQ2d 1015, 1018 (TTAB 2018)).

We find that “Applicant’s focus on the international classes in which the parties’ goods and services reside is misplaced. The classes are irrelevant. *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) (stating that

⁹⁵ Opposer’s brief, 41 TTABVUE 11.

classification is for the convenience of the Office and “wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification”).” *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, *11 n.16 (TTAB 2019). Rather, we look at the evidence as a whole, as if each piece of evidence were part of a puzzle to be fitted together. *Cf. W. Fla. Seafood, v. Jet Rests.*, 31 USPQ2d at 1663 (priority determination) *quoted in Moke America LLC v. Moke USA, LLC*, 2020 USPQ2d 10400, *7 (TTAB 2020).

Opposer’s entertainment programs, delivered via different media formats, fit together as pieces of the puzzle. *See Wirecard AG v. Striatum Ventures B.V.*, 2020 USPQ2d 10086, at *4-5, 8-9 (related goods and services). “A change in the kind of goods or services marketed under the trademark is not an abandonment of the trademark owner’s priority if the new goods or services are sufficiently related to the original goods or services such that prospective purchasers are likely to perceive the new product as originating from the same source as the original product.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 30 (1995) *quoted in MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 17:23 (“A change of use of a mark from one product to another will not constitute abandonment if the products are closely related.”).

Customers would naturally tend to expect entertainment media to evolve and change over time—from broadcast, cable, VHS, DVD, and streaming to live performances. *See Morgan Creek v. Foria*, 91 USPQ2d at 1137 (“Opposer also sells videos of all of its movies. Originally they were in the form of video cassettes, but since 1998 or 1999 they have been principally in the form of DVDs. ... In addition,

opposer sells copies of the soundtracks of many of its movies, and has sold more than 5 million in the United States. Originally they were sold in the form of record albums, then audio cassettes, and now they are sold as CDs.”). As McCarthy observes, “modernization and style changes are common and expected by buyers.” MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:24 (citing *inter alia* *E.I. Du Pont De Nemours and Company v. G.C. Murphy Co.*, 199 USPQ 807, (TTAB 1978) (change of product from premium-priced paint to budget-priced paint with slightly different formulation held not abandonment)). *See also* *E. I. du Pont de Nemours & Co. v. Big Bear Stores, Inc.*, 161 USPQ 50, 52 (TTAB 1969) (“The mere change of the use of a mark from one product [or service] to another variety thereof cannot constitute abandonment of the mark.”). It is therefore appropriate to consider the variety of entertainment formats together to determine if Opposer continued or discontinued its use of DOUBLE DARE. *See Double Coin Holdings v. Tru Dev.*, 2019 USPQ2d 377409 at *11. The evidence shows that Opposer’s provision of DOUBLE DARE entertainment programming evolved over the years, offering new, overlapping formats approximately every two years.⁹⁶

⁹⁶ Given Applicant’s failure to demonstrate bona fide intent to use DOUBLE DARE on ancillary goods, such as clothing, toys and games, we focus our analysis on Opposer’s use of the mark in connection with entertainment programming. If Opposer maintains priority in that area, clothing, toys and games would be viewed as ancillary to that programming. Applicant even describes goods such as clothing, toys and games as being within the “ancillary rights” of a trademark used with a program. Applicant’s brief, 42 TTABVUE 12. In any event, we note that Opposer has demonstrated use of the DOUBLE DARE MARK on apparel, with confidential sales figures in the thousands of dollars from 2009-2014, followed by two sparse years, followed by resurgent sales from 2017, on. Kingsley decl. ¶ 17, 22 TTABVUE 8-9, 24 TTABVUE 8-9 (confidential), Ex. 9, 24 TTABVUE 199 (confidential).

Applicant’s critiques of this evidence are not well-taken. *See* Applicant’s brief, 42 TTABVUE 11, 34-37. Contrary to Applicant’s assertions, Opposer’s figures are supported by testimony. Kingsley decl. ¶¶ 16-20, 22 TTABVUE 8-10, 24 TTABVUE 8-10 (confidential). Applicant contends that “Opposer’s only alleged uses of the phrase ‘Double Dare’ in class 25

Summers testifies that he was talking with Nickelodeon executives about hosting **new** on-air episodes of DOUBLE DARE, not other formats:

Q. Over time you indicated that you were persistent in trying to get Nickelodeon to reboot or to revive Double Dare; is that correct?

A. Absolutely.

Q. And **you were talking about creating new episodes that you hoped to host, correct?**

A. Yes.

Q. And - - but your discussions were not about other ways in which Nickelodeon might already be airing; old episodes or bringing back Double Dare as a live event or in other ways; is that right?

A. No, **I wanted to host the show again** on their channel, thought it made perfect sense as a programmer, and that was my whole mission.⁹⁷

Q. Okay. But, again, when you were undertaking this effort, which was ultimately successful, **you were focusing on new content, if you will, not old content that was still being used, or non-broadcast**

have been on shirts and socks where, in each case, the phrase was incorporated as a prominent, decorative, eye catching logo, without a “TM” indicating it to be a trademark.” Applicant’s brief, 42 TTABVUE 11; *see also* 42 TTABVUE 35-36. But the t-shirts and socks offered online bear the DOUBLE DARE logo from the television show, often with its signature “splat” design, accompanied by wording “Nickelodeon Double Dare Splat Logo T-Shirt,” “Super Sloppy Double Dare,” or “Nick Rewind Double Dare T-shirt.” Opposer’s NOR, 25 TTABVUE 18, ex. 49, 25 TTABVUE 322-23, Opposer’s rebuttal NOR, exs. 69-70, 36 TTABVUE 19-21. *See also* Applicant’s exs. 59, 24, Applicant’s NOR, 30 TTABVUE 37, 125. *See In re Paramount Pictures Corp.*, 213 USPQ 1111, 1112-15 (TTAB 1982) (MORK & MINDY registrable for decals because the applicant had a television series of that name and had previously registered MORK & MINDY for various goods and services). The presence or absence of a “TM” designation does not control its trademark significance. *See In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1124 (Fed. Cir. 2009) (noting that the use of “TM” may lend a degree of visual prominence to the designated matter, but is not dispositive of whether the designated matter functions as a mark).

⁹⁷ Summers dep. 72:3-18, 32 TTABVUE 73 (emphasis added).

events, correct?

A. Hundred percent.⁹⁸

Summers testified about his meeting with Nickelodeon CEO Cyma Zarghami:

Q. During that meeting, did Ms. Zarghami state, either in these words or to this effect, that Viacom had no interest in ever airing any Double Dare programming ever again, whether new, reruns or old?

A. The statement was never made.⁹⁹

In fact, as Mr. Summers acknowledged, even if DOUBLE DARE reruns did not run as “strip” programs, from Monday through Friday¹⁰⁰:

Shows - - reruns ran for freaking ever on Nic[kelodeon] and Nic[k] Properties from 2000, and I don’t know how far beyond that, but I know they were constantly on.¹⁰¹

Brian Banks, Vice President and Executive in Charge of Production for Live Action at Viacom since 2009 testifies, with support from tables showing “as scheduled” and “as aired” shows, that in 2009, DOUBLE DARE rebroadcasts numbered in the hundreds.¹⁰² (The numbers have been designated as confidential, so we refer to them in general terms.) The number of reruns aired dwindled to zero in 2010, then rose to single digits 2011, when Opposer launched “The ‘90s’ Are All That,”

⁹⁸ Summers dep. 72:24-73:5, 32 TTABVUE 73-74 (emphasis added).

⁹⁹ Summers dep. 66:14-19, 32 TTABVUE 67. To the same effect, *see* Summers dep. 66:20-67:2, 32 TTABVUE 67-68, 67:3-8, 32 TTABVUE 68.

¹⁰⁰ Summers dep. 16:12-16, 32 TTABVUE 17.

¹⁰¹ Summers dep. 13:9-12, 32 TTABVUE 14.

¹⁰² Banks decl. ¶¶ 1-2, 11-14, 21 TTABVUE 2, 5-6, 23 TTABVUE 2, 5-6 (confidential); ex. 1, 23 TTABVUE 22-46, 76 (confidential).

a program reprising hits from that decade.¹⁰³

In 2012-13, while on-air reruns were still in single digits, Opposer launched DOUBLE DARE live event shows.¹⁰⁴ Thomas Kingsley, Director of the Nickelodeon Experience at Viacom, testifies that in May 2012, Opposer began hosting live Double Dare Live at the Nickelodeon Suites Resort in Orlando Florida (the “Nick Hotel”) featuring the game’s signature trivia questions and messy physical challenges.¹⁰⁵

Travel publications announced the shows:

The Nickelodeon Suites Resort in Orlando just opened Double Dare live. They have the show in their Studio every day of the year.¹⁰⁶

Guests staying at the [Nickelodeon Suites Resort](#) in Orlando, Florida this summer are about to get super sloppy as the classic kids’ game show “Double Dare” has returned in a new stage show. Double Dare Live is performed daily in Nick Hotel’s Studio Nick, featuring all the gak-packed action from the former Marc Summers-hosted TV show.

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Opposer hosted live DOUBLE DARE events in New York and Chicago in 2014 and 2015.¹⁰⁸ Events of this sort promoted the “The ’90s Are All That” program, which was on air at the time.¹⁰⁹

Beginning in October 2014, Opposer made DOUBLE DARE programming available via another medium: digital downloads.¹¹⁰ Consumers could purchase and

¹⁰³ Banks decl. ¶¶ 17, 21, 21 TTABVUE 8, 23 TTABVUE 8 (confidential).

¹⁰⁴ Banks decl. ex. 1, 23 TTABVUE 47 (confidential).

¹⁰⁵ Kingsley decl. 22 TTABVUE 3, 24 TTABVUE 3 (confidential).

¹⁰⁶ 5/31/2012 VisitorLandForLess.com, accessed 1/6/2021, Opposer’s first NOR, 25 TTABVUE 181.

¹⁰⁷ 6/12/2012, InsideTheMagic.net, accessed 5/3/2018, Opposer’s first NOR, 25 TTABVUE 183-84.

¹⁰⁸ Kingsley decl. ¶¶ 8-9, 22 TTABVUE 4-5, 24 TTABVUE 4-5 (confidential).

¹⁰⁹ *Id.*

¹¹⁰ Kingsley decl. ¶¶ 23-24, 22 TTABVUE 11, 24 TTABVUE 11 (confidential).

download DOUBLE DARE programming at \$1.99 per episode or \$5.99 per season via Opposer’s “digital distribution partners,” Google, Amazon, and Apple iTunes.¹¹¹ For example:

Super Sloppy Double Dare 2 Seasons 1986

nickelodeon

Season 1 (7) 8.0/10

On your mark, get set, go! Join four contestants as they answer questions and take on messy physical challenges (like running in a giant hamster wheel, popping balloons filled with shaving cream, and more) for the chance to win Super Sloppy Double Dare!

Available to watch on [supported devices](#).

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Family Double Dare, Vol. 3

Open iTunes to preview or buy TV shows.

Description

Dive into the super messy competition with host Marc Summers and the teams as they crawl through chocolate-filled pipelines, take some pies to the face, pull a flag from a giant nose, cross monkey bars and more for a chance to take home awesome prizes!

Name	Description	Time	Price	
1 Episode 9	The Scharles and the Lentzs get messy at the movies, catch	23:19	\$1.99	View in iTunes

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According to Mr. Kingsley, a spreadsheet maintained by Opposer in the regular course of business shows (again with confidential numbers) that consumer purchases of these downloads numbered in the hundreds in the last quarter of 2014, and in the thousands annually thereafter.¹¹⁴

Applicant protests that “[n]one of the so-called ‘digital distribution partners’ are

¹¹¹ *Id.*; Opposer’s brief, 41 TTABVUE 20-21.

¹¹² Ex. 47, Amazon.com webpage accessed 5/4/2018, Opposer’s first NOR, 25 TTABVUE 313-15.

¹¹³ Ex. 48, itunes.apple.com accessed 5/4/2018, Opposer’s first NOR, 25 TTABVUE 316.

¹¹⁴ Kingsley decl. ¶ 27, 22 TTABVUE 12-13, 24 TTABVUE 12-13 (confidential), ex. 14, 22 TTABVUE 264-391, 24 TTABVUE 264-391 (confidential).

identified”; no agreements with them have been produced; “Mr. Kingsley provides no information on how the spreadsheet was assembled, the sources of the data or anything else about it”; and “[t]here is nothing to indicate that Opposer has done anything other than send these goods to a distributor (if that is, in fact, what happened, as no proof is provided), and that they have simply sat on the digital equivalent of a shelf since then.”¹¹⁵ (Citing *Societe Des Produits Marnier v. Distillerie Moccia*, 10 USPQ2d at 1244 & n.5 (finding that respondent’s last shipment of liqueurs over two years ago gave rise to a prima facie case of abandonment; “in our view, a party cannot defend against a claim of abandonment by relying on some ‘residual goodwill’ generated through subsequent sales of the product by distributors or retailers.”)).

We find, however, that Mr. Kingsley did identify the digital distribution partners: Google, Amazon, and Apple (the iTunes store); Applicant could have deposed Mr. Kingsley *duces tecum* to obtain additional documentation of Opposer’s agreements with the digital distribution partners, but failed to do so; the digital download spreadsheet of sales is based on records of transactions kept in the regular course of business; and this case is distinguishable from *Societe Des Produits Marnier v. Distillerie Moccia. Id.*

Distillerie Moccia shipped the last of its ROYAL MONIER brand bottles of liqueur to a United States importer in 1984, and did not replenish those stocks for years thereafter. On motion for summary judgment, the Board found under the then-prevailing law that “this constitutes non-use of the mark for at least two years and is

¹¹⁵ Applicant’s brief, 42 TTABVUE 40-41.

sufficient, prima facie, to raise the presumption of abandonment and shift the burden to applicant/respondent [Distillerie Moccia] to rebut the inference of abandonment.” *Id.* at 1244. Distillerie Moccia speculated that as long as a bottle of the liqueur sat on a shelf in a retail store, it retained “residual goodwill” in its brand. The Board held, however, that “a party cannot defend against a claim of abandonment by relying on some ‘residual goodwill’ generated through subsequent sales of the product by distributors or retailers.” *Id.* at 1244 n.5.¹¹⁶ Later decisions have echoed this holding. *See, e.g., Parfums Nautee Ltd. v. Am. Int’l. Indus.*, 22 USPQ2d 1306, 1309 (TTAB 1992) (“As to respondent’s contention that there somehow was residual goodwill in the registered mark by virtue of the product’s long shelf life and possible continued sales by retailers, this contention is wholly speculative and, in any event, unsupported.”). *See generally* “Residual Good Will in Unused Marks - the Case Against Abandonment,” 90 Trademark Rep. 615, 639-40 & nn.117, 118 (2000).

Digital downloads are different. Unlike liqueur bottles, the stock of downloads is not physical or finite, dwindling on a retail store shelf. Nor is their continued sale to consumers speculative. Their annual sales, monitored and overseen by Opposer, have progressed at a reasonable level, generally increasing year by year—especially (as will be seen) 2018, when Opposer produced new episodes of DOUBLE DARE.¹¹⁷ These digital download sales, moreover, are complemented by concurrent DOUBLE DARE reruns and live events—all promoted extensively on social media, keeping the

¹¹⁶ Distillerie Moccia avoided entry of summary judgment, however, by displaying its goods at a 1987 trade show and attempting to find a distributor. *Id.* at 1245.

¹¹⁷ Kingsley decl. ¶¶ 24, 27, ex. 14, 22 TTABVUE 11-13, 264-391, 24 TTABVUE 11-13, 264-391 (confidential).

DOUBLE DARE brand in the public eye.¹¹⁸ See *W. Fla. Seafood v. Jet Rests.*, 31 USPQ2d at 1664 (advertisements may be considered together with other evidence to establish that services were being offered under the advertised mark). We find there is no comparison with *Societe Des Produits Marnier v. Distillerie Moccia*.

Starting in 2016, Opposer used the DOUBLE DARE Mark in connection with recurring live DOUBLE DARE events at the Mall of America in Bloomington, Minnesota. The Mall of America features Nickelodeon Universe, a theme park featuring several of Nickelodeon's most recognized brands, including DOUBLE DARE. From June to August 2016, the Mall of America hosted "DOUBLE DARE Challenge," a live version of the Double Dare gameshow, at Nickelodeon Universe. The live DOUBLE DARE events at Nickelodeon Universe continued every year thereafter (except during the pandemic).¹¹⁹ The Mall of America advertised the events:

¹¹⁸ Banks decl. ¶¶ 18-19, 21, 23, 27, 21 TTABVUE 8-14, 23 TTABVUE 8-14, ex. 9, 23 TTABVUE 174-180 (confidential), ex. 10, 23 TTABVUE 183-186 (confidential).

¹¹⁹ Kingsley decl. ¶ 11, 22 TTABVUE 6, 24 TTABVUE 6 (confidential).



Confronted with this evidence, Applicant complains that “live events are not among the goods or services at issue in this matter.”¹²¹ Again, we beg to differ. The live events are among many different, overlapping formats Opposer uses to bring DOUBLE DARE entertainment shows to the public. They form pieces of the puzzle which, when fitted together, negate abandonment and establish prior use. *See West Fla. Seafood v. Jet Rests.*, 31 USPQ2d at 1663. Applicant argues that “Opposer’s alleged uses of the Mark are limited to uses at single venues, with no proof of any impact on interstate commerce.”¹²² “This is not interstate commerce and thus, not inherently regulable by Congress and, therefore, not bona fide use in commerce for purposes of establishing trademark rights” it contends.¹²³ But “a party may rely on use that is

¹²⁰ Mall of America on Twitter: 7/9/2017, Twitter.com/nickuniverse accessed 12/29/2020, Opposer’s first NOR, 25 TTABVUE 286.

¹²¹ Applicant’s brief, 42 TTABVUE 43.

¹²² Applicant’s brief, 42 TTABVUE 12.

¹²³ Applicant’s brief, 42 TTABVUE 45-46.

strictly intrastate to claim priority in a Board proceeding. *See First Niagara Ins. Brokers Inc. v. First Niagara Fin. Grp. Inc.*, 476 F.3d 867, 81 USPQ2d 1375 (Fed. Cir. 2007).” *Daniel J. Quirk, Inc. v. Village Car Co.*, 120 USPQ2d 1146, 1150 n.19 (TTAB 2016). *See also Christian Faith Fellowship Church v. adidas AG*, 841 F.3d 986, 120 USPQ2d 1640 (Fed. Cir. 2016) (“Because one need not direct goods across state lines for Congress to regulate the activity under the Commerce Clause, there is likewise no such per se condition for satisfying the Lanham Act’s ‘use in commerce’ requirement.”). Applicant suggests that “No admissible evidence shows that [the DOUBLE DARE live events at Nickelodeon Suites Resort in Orlando, Florida] was any more than a single event, which is insufficient to establish trademark rights.”¹²⁴ The “recurring live DOUBLE DARE events at the Mall of America in Bloomington, Minnesota ... were limited time events that ran possibly as seldom as ‘once a year’ since 2016 (Id.)”.¹²⁵ The evidence is to the contrary, indicating multiple live events. Applicant protests that the cross-promotion of “The ‘90’s Are All That” did not promote DOUBLE DARE on the air, as no DOUBLE DARE programs were broadcast in 2014.¹²⁶ In 2015, however, the on-air program was rechristened “Splat,” and DOUBLE DARE reruns increased to double digits.¹²⁷ Applicant further argues that

¹²⁴ Applicant’s brief, 42 TTABVUE 45.

¹²⁵ Applicant’s brief, 42 TTABVUE 50.

¹²⁶ Applicant’s brief, 42 TTABVUE 47. The foregoing are the most pertinent of Applicant’s arguments critiquing Opposer’s evidence. We have reviewed Applicant’s other arguments, such as the “natural expansion” theory, 42 TTABVUE 43, and its insinuation that “Double Dare” could also refer to a somewhat sexual game, 42 TTABVUE 49, and find them less meritorious.

¹²⁷ Banks decl. ¶¶ 18-19, 21 TTABVUE 8-9, 23 TTABVUE 8-9, ex. 1, 23 TTABVUE 47, ex. 2, 23 TTABVUE 74 (confidential). *See also* Summers dep. 60:5-17, 32 TTABVUE 61 (re “Splat” and “All That”); Opposer’s first NOR, 25 TTABVUE 203-04.

it was New Games Productions, not Opposer, who produced the live events, and no license agreements are adduced to show their relationship.¹²⁸ But as Joann Acevedo, Opposer's Vice President of Consumer Products testified, "New Games Productions Inc. has produced several live events for Viacom, including live DOUBLE DARE events. New Games Productions Inc. was authorized to use the DOUBLE DARE trademark in connection with live DOUBLE DARE events and to do so under Viacom's direction and control."¹²⁹ New Games Productions is a wholly-owned subsidiary of Opposer, so no license agreement was required.¹³⁰

In July 2016, DOUBLE DARE celebrated the 30th anniversary of its 1986 premiere with a live event at Comic-Con in San Diego, hosted by Marc Summers. Opposer advertised the live event extensively on social media and Viacom networks, and broadcast it live on its Facebook page associated with "The Splat" late night programming block.¹³¹ This was followed in November of that year by the DOUBLE DARE Reunion special, which aired on Opposer's Nick at Night network. The reunion was also extensively advertised, and garnered more than a million viewers.¹³²

Applicant contends these were single, "one-off" events, and argues that "[a]s the Trademark Manual of Examiners Practices [sic] ("TMEP") makes clear, the airing of a single program is not sufficient to create new trademark rights. *See* TMEP Section

¹²⁸ Applicant's brief, 42 TTABVUE 50.

¹²⁹ Acevedo decl. ¶ 5, 34 TTABVUE 4.

¹³⁰ Acevedo decl. ¶ 4, 34 TTABVUE 4. *See* Opposer's reply brief, 45 TTABVUE 18n.11.

¹³¹ Banks decl. ¶¶ 20-21, 21 TTABVUE 9-10, 23 TTABVUE 9-10; Kingsley decl. ¶ 13, 22 TTABVUE 7, 24 TTABVUE 7 (confidential).

¹³² Banks decl. ¶¶ 22-23, Banks decl., 21 TTABVUE 10-11, 23 TTABVUE 10-11.

1202.08.”¹³³ That section of the TRADEMARK MANUAL OF EXAMINING PROCEDURE concerns a title of a single creative work. TMEP § 1202.08 (July 2021). It further states that “[g]enerally, any creative work will not be considered a single creative work if evidence exists that it is part of a series ... or is a type of work in which the content changes with each issue or performance.” TMEP § 1202.08(b). The name for a series has a trademark function, indicating that each part of the series comes from the same source as the others. *See In re Cooper*, 254 F.2d 611, 117 USPQ 396, 400 (CCPA 1958) *quoted in In re Scholastic Inc.*, 23 USPQ2d 1774, 1776 (TTAB 1992) (series name THE MAGIC SCHOOL BUS registrable). *See generally In re MCDM Prods., LLC*, 2022 USPQ2d 227 (TTAB 2022); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10:6.

Here, the DOUBLE DARE live and on-air specials were clearly part of the DOUBLE DARE series. They featured the show’s original host, Marc Summers, with his colleagues from the original show, Harvey and Robin; the on-air special showed clips from the earlier DOUBLE DARE programming; and they applied the same rules to contestants, who answered trivia questions, competed in physical challenges, and took on a messy obstacle course.¹³⁴ As such, they commemorated and continued a series that had aired for decades.¹³⁵ The on-air reruns saw a marked increase, still in double digits annually.¹³⁶

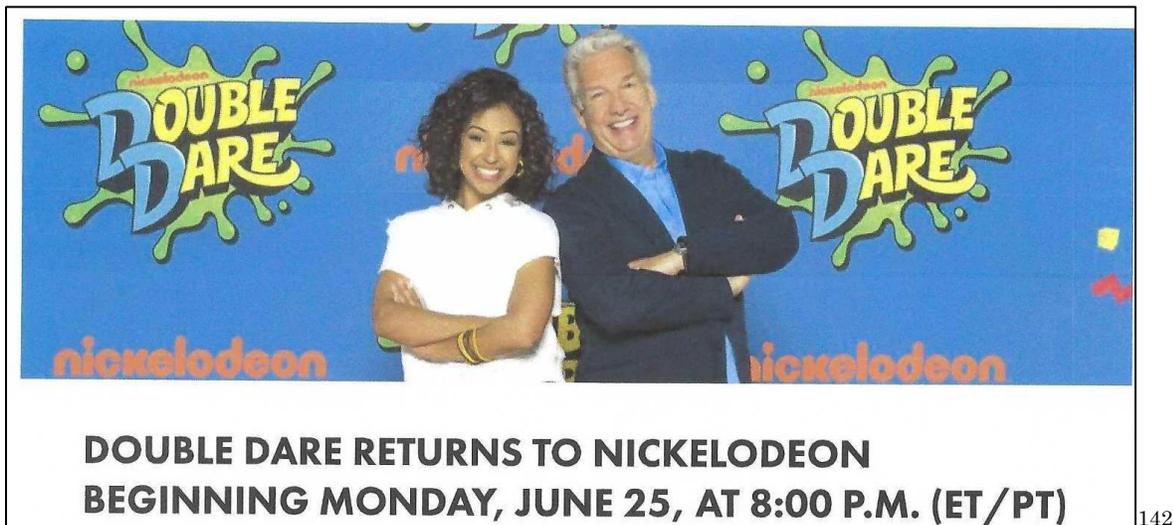
¹³³ Applicant’s brief, 42 TTABVUE 22, 31; *see* Summers dep. 70:9-11, 71:11-15, 32 TTABVUE 71-72.

¹³⁴ *See* Banks decl. ¶ 22, 21 TTABVUE 10-11, 23 TTABVUE 10-11; Summers dep. 61:7-9, 32 TTABVUE 62, Opposer’s first NOR, 25 TTABVUE 221, 231.

¹³⁵ Opposer’s reply brief, 45 TTABVUE 19.

¹³⁶ Banks decl. ex, 2, 23 TTABVUE 74-75 (confidential).

The DOUBLE DARE Reunion Special and the DOUBLE DARE live show at the San Diego Comic-Con served as tests to see whether there was an appetite among fans for new DOUBLE DARE content, both live and on-air.¹³⁷ As Marc Summers put it, “we did what I considered the hot test event in Comic-Con that year.”¹³⁸ “[T]he show aired and did quite well, which is why I think the show was revived.”¹³⁹ Encouraged by the popularity of the 2016 specials, Opposer reassessed the market appeal of DOUBLE DARE, considering both live and on-air shows,¹⁴⁰ and rebooted DOUBLE DARE in 2018 with Marc Summers as the show’s executive producer and announcer and 60 new episodes airing regularly, every day of the week, through early 2020.¹⁴¹ Opposer advertised the reboot heavily:



¹³⁷ Banks decl. ¶ 24, 21 TTABVUE 11-12, 23 TTABVUE 11-12 (confidential).

¹³⁸ Summers dep. 61:10-11, 32 TTABVUE 62.

¹³⁹ Summers dep. 62:9-11, 32 TTABVUE 63.

¹⁴⁰ Banks decl., 21 TTABVUE 11-12, 23 TTABVUE 11-12 (confidential); ex. 11, 23 TTABVUE 188-90 (confidential).

¹⁴¹ Banks decl. ¶¶ 27, 35, 21 TTABVUE 13, 23 TTABVUE 13 (confidential) ex. 1, 23 TTABVUE 48-71, ex. 2, 23 TTABVUE 76-113 (confidential); Summers dep. 11:12-15, 32 TTABVUE 12, 62:12-22, 32 TTABVUE 63.

¹⁴² NickPress.com/press-releases/2018/05/22, 30 TTABVUE 77 (Marc Summers on right).

The reboot garnered over a million viewers for its first show, and tens of millions of viewers for its first season.¹⁴³ It was followed by an 18-month, 70-city tour of DOUBLE DARE live, hosted by Marc Summers.¹⁴⁴ And the new episodes have been sold by the thousands via digital download.¹⁴⁵

Applicant maintains that in the interim between the 2016 reunion shows and the 2018 reboot, “[m]erely reconsidering periodically whether to resume use of the programs is not sufficient to stave off abandonment.”¹⁴⁶ (Citing *Silverman v. CBS, Inc.*, 870 F.2d 40, 9 USPQ2d 1778, 1783 (2d Cir. 1989) (television show *Amos ‘N’ Andy* deemed abandoned)). Even though Opposer staged a successful DOUBLE DARE reboot, Applicant maintains that Opposer’s own press releases make it clear that DOUBLE DARE reruns were not being aired in any significant way prior to the launch of the 2018 reboot. An April 25, 2018 press release states “Nickelodeon is bringing back the original kids’ game show Double Dare this summer with 40 brand new episodes....” and a June 25, 2018 press release identifies “Monday, June 25, at 8:00 PM (ET/PT) as the premiere date for the iconic game show’s return.”¹⁴⁷ Both tacitly acknowledge that the show “had been gone from the airwaves,” Applicant infers, “How else could it return?”¹⁴⁸

¹⁴³ Banks decl. ¶¶ 36-37, Banks decl., 21 TTABVUE 17-18, 23 TTABVUE 17-18 (confidential); Kingsley decl. ¶ 14, 22 TTABVUE 7-8, 24 TTABVUE 7-8 (confidential).

¹⁴⁴ Summers dep. 11:12-20; 32 TTABVUE 12, 63:21-64:1, 32 TTABVUE 64-65.

¹⁴⁵ Kingsley decl. ¶¶ 24, 27, 22 TTABVUE 11-13, 24 TTABVUE 11-13 (confidential), ex. 14, 22 TTABVUE 264-391, 24 TTABVUE 264-391 (confidential).

¹⁴⁶ Applicant’s brief, 42 TTABVUE 30, 32.

¹⁴⁷ Ex. 13, 21 TTABVUE 199-200; ex. 74 to Applicant’s NOR, 30 TTABVUE 77-79.

¹⁴⁸ Applicant’s brief, 42 TTABVUE 27.

But as Opposer correctly notes, the “reboot” refers to newly created episodes, as opposed to reruns.¹⁴⁹ To “reboot” means “to produce a distinctly new version of (an established media franchise, as a film, TV show, video game, or comic book)” as in “[t]he studio is rebooting Spider-Man.”¹⁵⁰ The brand new episodes continued the DOUBLE DARE series.

The present case is unlike *Silverman v. CBS*, on which Applicant relies. In that case, CBS broadcast the “Amos ‘n’ Andy” television series on affiliate stations until 1953, and continued in reruns and non-network syndication until 1966, when CBS decided to take it off the air in response to complaints by civil rights organizations. Silverman sought to use “Amos ‘n’ Andy” in a musical play, contending the term, unused for two decades, was abandoned and in the public domain. The Second Circuit Court of Appeals agreed, holding that “a proprietor may not protect a mark if he discontinues using it for more than 20 years and has no plans to use or permit its use in the reasonably foreseeable future.” *Id.* 9 USPQ2d at 1783, *quoted in Gen. Motors Corp. v. Aristide & Co., Antiquaire de Marques*, 87 USPQ2d 1179, 1182 (TTAB 2008) and *Executive Coach Builders v. SPV Coach*, 123 USPQ2d at 1198-99. Here, in contrast, Opposer continued to use the DOUBLE DARE mark in reruns, downloads, and periodic live events, including the 2016 live and on-air reunion shows, which demonstrated the show’s enduring popularity and impelled Opposer to stage its on-air DOUBLE DARE reboot, followed by even more live events. Even though the reboot

¹⁴⁹ Opposer’s reply brief, 45 TTABVUE 16.

¹⁵⁰ Dictionary.com, 1/24/22, *cited in* Opposer’s reply brief, 45 TTABVUE 16n.9.

premiered on June 25, 2018,¹⁵¹ after Applicant’s January 2018 constructive use filing date, it nonetheless evinces Opposer’s prior intent to continue producing DOUBLE DARE entertainment programming for the foreseeable future—just as Applicant’s July 2018 “sizzle reel” evinced its prior bona fide intent to use the mark. *Cf. Swatch v. Berger*, 108 USPQ2d at 1474 (use seven months after trademark application sufficiently contemporaneous to bear on applicant’s bona fide intent); *Peterson v. Awshucks*, 2020 USPQ2d 11526, at *10 (“Subsequent use may also be probative of whether the registrant intended to commence use during a previous period of nonuse. ... Such evidence should temporally and logically link the later use to the prior nonuse, such that an inference can be drawn regarding the intent to resume use during the period of nonuse....”).

In sum, Opposer has adduced evidence of its sequentially overlapping layers of use in a variety of formats, all reasonably calculated to convey to its audience that each is part of a continuing series of the same show: DOUBLE DARE. Rather than presenting contravening facts, Applicant attempts to dissect Opposer’s evidence. Yet despite these attempts, Opposer’s evidence of prior use, taken in its entirety, “stands un rebutted.” *Kemi Organics v. Gupta*, 126 USPQ2d at 1609. There has been no showing that “use has been discontinued with intent not to resume.” 15 U.S.C. § 1127.

C. Misuse Abandonment

1. Applicant’s Arguments

Applicant further contends that Opposer abandoned any rights it might once have

¹⁵¹ Banks decl. ¶ 35, 21 TTABVUE 17.

had in DOUBLE DARE through failure to police its rights against third parties.¹⁵²

“Nor is Opposer the only entity to use the Mark, or close variations of the Mark, in association with live events,” Applicant contends.¹⁵³ “There is, on the other hand, overwhelming evidence that Opposer is not the only entity to use the Mark, or a variant thereof, in connection with live events and that Opposer has not considered the Mark a significant enough asset to make any efforts in protecting it.”¹⁵⁴

Applicant provides a number of examples, principal among which are the following.

- The original “Double Dare” game show hosted by the late Alex Trebek ran for 20 episodes before it was cancelled in 1977. Those episodes are still available for streaming on Amazon.com or for watching on YouTube, Applicant notes, so “Opposer is in no position to allege that consumers associate the Mark solely with Opposer.”¹⁵⁵

- Beginning in June 2012, Marc Summers hosted a live event entitled “Dunkel Dare” at a Philadelphia restaurant. He testified that the event—essentially a “drunk Double Dare” for adults, featuring alcohol consumption and risqué patter—used props, signage and an obstacle course modeled on the DOUBLE DARE children’s game show, and was called “Dunkel Dare so we wouldn’t get sued.”¹⁵⁶ The event ran annually for four or five years. Opposer had no involvement in “Dunkel Dare,” and as

¹⁵² See Applicant’s brief, 42 TTABVUE 10, 12, 33-34, 41-42, 52-56.

¹⁵³ Applicant’s brief, 42 TTABVUE 12.

¹⁵⁴ Applicant’s brief, 42 TTABVUE 54.

¹⁵⁵ Applicant’s brief, 42 TTABVUE 10, 42; Applicant’s NOR ex. 9, 83-86, 28 TTABVUE 1028-34, 30 TTABVUE 101-06.

¹⁵⁶ Summers Dep. 39:13-40:21, 32 TTABVUE 40-41.

far as Mr. Summers knew, did not object to the event.¹⁵⁷ The restaurant group went so far as to register DUNKEL DARE with the USPTO with no opposition from Opposer.¹⁵⁸

- Another mark, DOUBLE DOG DARE, also proceeded to registration for “entertainment in the nature of animal exhibitions; entertainment in the nature of live performances by animals” with no opposition from Opposer.¹⁵⁹

- Marc Summers also participated in a music video in which members of the band Good Charlotte parodied FAMILY DOUBLE DARE by acting like contestants on the show. He was unaware of any objections from Opposer.¹⁶⁰

Applicant raises other examples of third-party use of “Double Dare,”¹⁶¹ all of which we have reviewed, but the foregoing suffice to indicate the tenor of its argument: Opposer cannot claim to be the only entity making use of the DOUBLE DARE mark or close approximations thereof, and has abandoned any rights it may once have had through failure to police its rights.¹⁶²

2. Burden of Proof

Section 45 of the Trademark Act provides, once again, that a mark shall be deemed

¹⁵⁷ Summers Dep. 42:1-43:25, 32 TTABVUE 43-44; Applicant’s NOR exs. 65:14-15, 31 TTABVUE 69-71.

¹⁵⁸ Reg. No. 4593356, issued Aug. 26, 2014, ex. 56, 30 TTABVUE 131-32. Declarations of use and incontestability accepted and acknowledged.

¹⁵⁹ Reg. No. 5147585, issued Feb. 21, 2017, ex. 54, 30 TTABVUE 35.

¹⁶⁰ Summers dep. 47:17-25, 49:18-50:12, 32 TTABVUE 48, 50-51, Applicant’s NOR ex. 62, 30 TTABVUE 42-44, ex. 65:17, 31 TTABVUE 72-75.

¹⁶¹ See, e.g., Applicant’s brief, 42 TTABVUE 52-53, 30 TTABVUE 146-50 (references to “Double Dare Contest” at a resort in Pennsylvania, and to “Home Games Entertainment” marketing live entertainment as a “tribute” to game shows.

¹⁶² Applicant’s brief, 42 TTABVUE 10, 54.

to be abandoned:

(2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark.

15 U.S.C. § 1127.

Failure to police third-parties' use of a mark could cause it to become generic or otherwise lose its significance as a mark:

Without question, distinctiveness can be lost by failing to take action against infringers. If there are numerous products in the marketplace bearing the alleged mark, purchasers may learn to ignore the "mark" as a source identification. When that occurs, the conduct of the former owner, by failing to police its mark, can be said to have caused the mark to lose its significance as a mark.

Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp., 680 F.2d 755, 214 USPQ 327, 336 (CCPA 1982) *quoted in Univ. Book Store v. Univ. of Wisc. Regents*, 33 USPQ2d 1385, 1393 (TTAB 1994). But a defendant attempting to prove abandonment in this manner "faces a formidable evidentiary burden," according to Professor McCarthy:

To prove the first possibility, the challenger must surmount the difficult hurdle of proving that the mark has become through widespread usage a generic name of these goods or services. To prove the second possibility that the designation has lost its significance as a mark, the burden of proof is even higher: "Only when all rights of protection are extinguished is there abandonment."

2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:1 (quoting *Wallpaper v. Crown*, 214 USPQ at 335; *quoted in Woodstock's Enters. Inc. (California) v. Woodstock's Enters. Inc. (Oregon)*, 43 USPQ2d 1440, 1446 (TTAB 1997). *See also* McCarthy § 17:17.

3. Discussion

This case poses a dilemma for Applicant. If Applicant met its burden of proving that DOUBLE DARE is generic, or has lost its significance as a mark, then the term would be ineligible for federal trademark registration. *In re GJ & AM, LLC*, 2021 USPQ2d 617, *4 (TTAB 2021) (generic mark ineligible); *In re AC Webconnecting Holding B.V.*, 2020 USPQ2d 11048, *2-3 (TTAB 2020) (matter that does not meet the statutory definition of a trademark “may not be registered, regardless of the register on which registration is sought”). That would run counter to Applicant’s application to register the term, which presupposes its distinctiveness. Alternatively, if Applicant fails to prove abandonment by misuse, then Opposer retains its rights in the DOUBLE DARE mark.

We find that Applicant has not borne its formidable evidentiary burden of proving abandonment by misuse. Even if “Opposer is not the only entity to use the Mark,” as Applicant contends, “maintenance of exclusivity of rights in a mark is not required in order to avoid a finding of abandonment....” *Wallpaper v. Crown*, 214 USPQ at 333, quoted in *Leatherwood Scopes Int’l, Inc. v. Leatherwood*, 63 USPQ2d 1699, 1703 (TTAB 2002). “[A]n owner is not required to act immediately against every possibly infringing use to avoid a holding of abandonment.” *Wallpaper v. Crown*, 214 USPQ at 336. Applicant’s evidence bears, at most, on the strength or weakness of Opposer’s DOUBLE DARE mark. *Univ. Book Store v. Univ. of Wisc. Regents*, 33 USPQ2d at 1402.

Furthermore, Applicant’s evidence does not bear very heavily on the strength of the DOUBLE DARE mark. The original “Double Dare” game show hosted by the late

Alex Trebek was cancelled almost a decade before Opposer began producing the DOUBLE DARE children’s game show in 1986.¹⁶³ Even if copies of the cancelled show are still available digitally, “there is no evidence of any public recognition of that program, no evidence concerning the number of times that program has been downloaded, and no evidence that the consuming public has ever heard of that program, unlike DOUBLE DARE,” Opposer correctly observes. Where the “record includes no evidence about the extent of [third-party] uses ... [t]he probative value of this evidence is thus minimal.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005), (quoting *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001)).

Evidence of third-party use of similar marks on similar goods or services may serve to diminish the relative commercial strength of a plaintiff’s mark. *Palm Bay*, 73 USPQ2d at 1693. But DUNKEL DARE, the “drunk adult” version that Marc Summers hosted at a Philadelphia restaurant, is on its face materially different from DOUBLE DARE, as is DOUBLE DOG DARE for “entertainment in the nature of animal exhibitions; entertainment in the nature of live performances by animals.” The marks and the services are sufficiently different and distinct in nature from Opposer’s DOUBLE DARE to preclude an inference of abandonment, *Univ. Book Store v. Univ. of Wisc. Regents*, 33 USPQ2d at 1397, much less commercial weakness. *See Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693-95 (Fed. Cir. 2018) (probative value of applicant’s third-party

¹⁶³ Klinghoffer decl. ¶ 4, 29 TTABVue 26.

use evidence diminished because of dissimilar goods). None of these third-party marks comes as close to Opposer's as Applicant's mark, which is, of course, identical to Opposer's mark.

Opposer has opposed registration of marks where, as here, they strayed too close to DOUBLE DARE. When a third party, Stygian, LLC, applied to register DOUBLE DARE YOU for film and television production, for example, Opposer filed a notice of opposition and settled the proceeding to its satisfaction, placing agreed limits (the particulars of which are confidential) on that applicant's use of that mark.¹⁶⁴ Opposer did not find Applicant's other examples of third-party use likely to cause confusion, mistake or deception, and thus found no need to enforce its rights against them.¹⁶⁵ "Thus, it is entirely reasonable for the opposer to object to the use of certain marks in use on some goods which it believes would conflict with the use of its marks on its goods and services while not objecting to use of a similar mark on other goods which it does not believe would conflict with its own use." *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899-1900 (TTAB 1989) (McDonalds' failure to object to some other "MC" formative marks did not weaken its mark).

The Good Charlotte music video parody demonstrates, if anything, the strength and recognition of Opposer's DOUBLE DARE mark, since "a mark has to be well known in the first place to be parodied." *In re Serial Podcast, LLC*, 126 USPQ2d 1061, 1076 (TTAB 2018). Opposer, in fact, points to considerable unsolicited media

¹⁶⁴ Acevedo decl. ¶ 14, 34 TTABVUE 5, ex. B, 33 TTABVUE 12-23 (confidential); Opposer's first NOR, exs. 61-63, 25 TTABVUE 399-421; Applicant's NOR, 30 TTABVUE 49-52.

¹⁶⁵ See Opposer's answer to Applicant's Interrogatory no. 2, Applicant's NOR, 28 TTABVUE 53-57.

recognition of DOUBLE DARE, dubbing the show “iconic,” “classic,” and, according to TV Guide, among the “60 Greatest Game Shows of All Time.”¹⁶⁶ For example:

- “Good Charlotte Pays Homage to ‘Double Dare’”—BillBoard.com, March 15, 2011;¹⁶⁷
- “ABOUT LAST NIGHT: ‘Double’ Trouble” “Admit it: Good Charlotte just lived out one of your childhood dreams. In their new music video for ‘Last Night,’ the rockers face off on the set of the classic Nickelodeon game show ‘Family Double Dare’ And yes, host Marc Summers even makes a cameo....”—Chicago Tribune, March 21, 2011;¹⁶⁸
- “‘Double Dare’: The Eternal Allure of Getting ‘Super Sloppy’”—Entertainment Weekly August 9, 2011;¹⁶⁹
- “The 60 Greatest Game Shows of All Time”—TV Guide June 12, 2013;¹⁷⁰
- “Ode to Green Slime”—Atlantic Online Feb. 6, 2015;¹⁷¹
- “Nickelodeon to Livestream 30th Anniversary ‘Double Dare’ Special at Comic-Con”—CBS News July 16, 2016;¹⁷²
- “There was a ‘Double-Dare’ Revival at Comic-Con and it Was as Awesome as it Sounds”—Los Angeles Daily News July 23, 2016;¹⁷³
- “Nickelodeon’s ‘Double Dare’ Gets New Special”—CNN Oct. 6, 2016;¹⁷⁴ and
- The DOUBLE DARE Reunion Special that year garnered numerous press

¹⁶⁶ Opposer’s brief, 41 TTABVUE 36, 44, reply brief, 45 TTABVUE 24, citing Opposer’s NOR exs. 5, 10, 15, 16, 24, 29, 30, 35, 37, 44, 45, 46, 25 TTABVUE 113-311.

¹⁶⁷ Ex. 12, 25 TTABVUE 141.

¹⁶⁸ Ex. 13, 25 TTABVUE 144.

¹⁶⁹ Ex. 16, 25 TTABVUE 155-57.

¹⁷⁰ Ex. 24, 25 TTABVUE 191-93.

¹⁷¹ Ex. 26, 25 TTABVUE 198-201.

¹⁷² Ex. 29, 25 TTABVUE 215.

¹⁷³ Ex. 32, 25 TTABVUE 230-31.

¹⁷⁴ Ex. 36, 25 TTABVUE 253-54.

impressions.¹⁷⁵

Opposer has also offered evidence of surveys regarding the popularity of the DOUBLE DARE show. Two studies conducted for Opposer in 2012 and 2013 indicated that DOUBLE DARE was among the top five Nickelodeon series that had the highest level of recognition and nostalgia among parents and millennials.¹⁷⁶ In another study Opposer commissioned in 2018 to determine demand for a reboot, an online survey of 1,291 respondents “representative to the U.S. Census in terms of age, gender, ethnicity, and geographic location” indicated that a substantial percentage had heard of DOUBLE DARE, that over a third of the survey population had seen the show.¹⁷⁷

Applicant argues that “Opposer has failed to establish that it retains residual goodwill in the mark, and any such residual goodwill would not justify Opposer’s retaining rights in the mark.”¹⁷⁸ “Opposer could not avoid a finding of abandonment purely because it is able to find a percentage of the population that can recall Legacy Double Dare when prompted to do so,” Applicant contends (citing *General Motors v. Aristide*, 87 USPQ2d at 1182). Applicant also quotes a law review article: “United States federal courts have struggled with the concept of residual goodwill. Some seem hostile to applying a principle that allows anyone to adopt an abandoned trademark and to begin using it, yet to date no court has protected a truly abandoned mark on

¹⁷⁵ Opposer’s brief, 40 TTABVUE 26 (confidential), Banks decl. ¶ 24, ex. 11, 23 TTABVUE 11-12, 190 (confidential).

¹⁷⁶ Banks decl. ¶ 25, ex. 12, 23 TTABVUE 12-13, 191-197 (confidential).

¹⁷⁷ Banks decl. ¶ 28, ex. 15, 23 TTABVUE 14, 209 (confidential).

¹⁷⁸ Applicant’s brief, 42 TTABVUE 55.

the basis of residual goodwill, alone.” J. Gilson and A. Gilson LaLonde, “The Zombie Trademark: A Windfall and a Pitfall,” 98 TMR 1280 (2008).¹⁷⁹

Accordingly, Applicant contends, unsolicited press mentions of DOUBLE DARE “are insufficient to create trademark rights.”¹⁸⁰ Similarly, with respect to Opposer’s surveys, “Applicant has found no decision in which this sort of nostalgia that Opposer’s survey evidences was sufficient to maintain rights in a mark, let alone create rights in a mark, nor been found sufficient to constitute ‘Fame.’”¹⁸¹ The 2012 survey, it notes, “states merely that, when asked if they could remember seeing Legacy Double Dare, less than a third of those asked could remember seeing the show as a child. It tells us nothing whatsoever about any associations they may have with the Mark as of the survey date, or even if they view ‘Double Dare’ as a trademark.”¹⁸² As for the 2018 survey, “the Exhibit indicates it was released in April, 2018. This is shortly after the announcement of the “revival” of Legacy Double Dare and the publicity surrounding that announcement. ... This confluence of dates could certainly have skewed these numbers. Even with that, all the survey tells us is that [a sizeable percentage] respondents had ‘heard of Double Dare,’” Applicant argues.¹⁸³

On consideration of all the parties’ arguments and evidence under the applicable law, we find that Applicant has not met its burden of proving that DOUBLE DARE

¹⁷⁹ *Id.*

¹⁸⁰ Applicant’s brief, 42 TTABVUE 53 n.6.

¹⁸¹ Applicant’s brief, 42 TTABVUE 55-56.

¹⁸² Applicant’s brief, 42 TTABVUE 55.

¹⁸³ Applicant’s brief, 42 TTABVUE 55-56.

is generic, or has lost its significance as a mark, such that it should be deemed abandoned. 15 U.S.C. § 1127.

To begin with, it appears that Applicant has conflated **misuse** with **nonuse** abandonment. Proof of residual goodwill will not save a mark that has been abandoned through **nonuse**. For instance, in *General Motors v. Aristide*, on which Applicant relies, the Board found:

Opposer's nonuse on automobiles is in excess of sixty years. Indeed, opposer does not offer any evidence or explanation for its nonuse between 1940 and the early 1990's. It has not shown that it has used its LASALLE mark on any goods during this period nor has it provided any explanation for its plans to resume use of this particular mark on vehicles.

87 USPQ2d at 1182.

That is **nonuse**, the first type of abandonment.

Under **misuse**, the second type of abandonment, the relevant public's continued recognition of a mark as a mark is the antithesis of abandonment via genericness or loss of significance as a mark. Where "some of the public continued to identify the prior user with the mark, ... the record did not establish that the prior user's course of conduct had caused the mark to lose its significance as an indication of origin..." *Wallpaper v. Crown*, 214 USPQ at 335 (internal punctuation omitted). "[S]o long as at least some purchasers identify respondent with the registered mark, it cannot be said that [the mark owner's] course of conduct has caused the registered mark to lose its significance as a mark." *Woodstock's Enters. (California) v. Woodstock's Enters. (Oregon)*, 43 USPQ2d at 1446. "Residual goodwill means that consumers still associate the mark with the original owner." J. Gilson & A. Gilson LaLonde, "The Zombie Trademark: A Windfall and A Pitfall," 98 Trademark Rep. at 1300.

Clearly, DOUBLE DARE is still widely recognized as the mark of Opposer's children's game show. As the evidence indicates, viewers have enjoyed DOUBLE DARE over the years through a variety of media—from television and cable to downloading and streaming to live events. The occasional third-party variants or parodies have not diminished this association. The numerous unsolicited press mentions of DOUBLE DARE may not have created Opposer's trademark rights, but they do evince the continued public recognition of Opposer's mark. And the surveys, particularly the 2018 survey, corroborate the public's continued recognition: over a third of that survey population had seen the DOUBLE DARE show, nearly all of that group remembered enjoying the show, which had cross-generational appeal, and nearly nine out of ten said they would tune in for a reboot.¹⁸⁴

D. Conclusion

When we consider the evidence as a whole, as if each piece were part of a puzzle, we find that Applicant has failed to show abandonment of Opposer's DOUBLE DARE mark either by nonuse or misuse. The mark is thus not available for Applicant to adopt and use as its own. Opposer retains its prior rights in the mark.

Given Opposer's priority, as well as the identity of the parties' marks and services, consumer confusion is not only likely, but inevitable under Section 2(d): "When a newcomer appropriates an abandoned trademark that is still infused with residual goodwill, and then starts using it on the same or even sometimes on different products, public confusion and deception are almost certain." J. Gilson & A. Gilson

¹⁸⁴ Banks decl. ¶ 28, ex. 15 (confidential), 23 TTABVUE 14, 209 (confidential).

LaLonde, *The Zombie Trademark: A Windfall and A Pitfall*, 98 Trademark Rep. 1280 at 1300.¹⁸⁵ We therefore sustain the opposition on the basis of likelihood of confusion.

VII. Dilution

Because we sustain the opposition on the grounds of priority and likelihood of confusion, as well as lack of bona fide intent to use, we need not consider Opposer's dilution claim. *L'Oreal v. Marcon*, 102 USPQ2d at 1444. *See also In re Suuberg*, 2021 USPQ2d 1209, *9-10 (TTAB 2021) (Board decides only those claims necessary to enter judgment).

VIII. Conclusion and Decision

We have considered of all of the evidence of record and all of the arguments of the parties under the applicable law. Given the multitude of arguments raised, we have focused on those that are most pertinent; those we have not expressly discussed would be disposed of in like manner, and would not materially affect the outcome. *See Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35, *4 (Fed. Cir. 2021) ("We have held 'on multiple occasions that failure to explicitly discuss every issue or every piece of evidence does not alone establish that the tribunal did not consider it.' ... [The Board] was not obliged to discuss every piece of evidence that [a

¹⁸⁵ Again, since Opposer has established priority in DOUBLE DARE in connection with entertainment programming, clothing, toys and games bearing the DOUBLE DARE mark would be viewed as ancillary or collateral to that programming. *See* Applicant's brief, 42 TTABVUE 12 (describing "ancillary rights" of a trademark used with a program). *In re Paramount Pictures*, 213 USPQ at 1112-13 (use of marks on collateral products protected). As the Board has stated, "It may be appropriate at this point to note, as has been observed by one commentator, that the statutory concept of "likelihood of confusion" denotes any type of confusion, including not only source confusion but also 'confusion of affiliation; confusion of connection; or confusion of sponsorship.'" *In re Nat'l Novice Hockey League, Inc.*, 222 USPQ 638, 641 n.7 (TTAB 1984); *see generally* 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:6 (5th ed. Dec. 2021).

party] raised.”). The Opposition is sustained under Section 2(d) as to all International Classes in the Application on the basis of Opposer’s priority and likelihood of confusion. 15 U.S.C. § 1052(d). The opposition is also sustained as to International Classes 9, 25, and 28 on the basis of Applicant’s lack of bona fide intent to use the applied-for mark on the goods identified in those classes. 15 U.S.C. § 1051(b).

Appendix A: Rulings on the Parties’ Evidentiary Objections

The parties’ objections and responses thereto can be found in Opposer’s Appendix to its main brief, 41 TTABVUE 58-71, Applicant’s Appendix to its main brief, 42 TTABVUE 59-90 (redacted), 43 TTABVUE 59-90 (confidential), and Opposer’s reply brief Appendix, 45 TTABVUE 28-59 (redacted) 44 TTABVUE 28-90 (confidential)).

Opposer’s Objections to Applicant’s Evidence

A. Opposer’s Objections to Applicant’s Third-Party Registration Evidence

Applicant has introduced evidence of third-party registrations of marks with the USPTO containing variations on “DOUBLE DARE,” such as DOUBLE DARE YOU, issued to third party Stygian, LLC, DOUBLE DOG DARE, issued to third party The Marvelous Mutts, LLC, and DUNKEL DARE, issued to third party Bierfish Restaurant Partners. See Applicant’s first NOR, exs. 43-56, 28, 30-31 TTABVUE.

Opposer argues that these third-party registrations are not evidence of actual use of the registered marks, are immaterial to the issues of likelihood of confusion or abandonment, and should therefore be excluded from evidence.¹⁸⁶

¹⁸⁶ 41 TTABVUE 58-60.

We agree with Applicant, however, that the third-party registrations are relevant to Applicant's contention that Opposer failed to police its DOUBLE DARE mark.¹⁸⁷ Opposer's objection goes to the weight to be afforded this evidence, not its admissibility. The objection accordingly is overruled, and all of the third-party registrations have been considered for what they are worth.

B. Opposer's Objection to Applicant's Reliance on Internet Materials to the Extent Offered for the Truth of Matters Contained Therein.

Applicant has introduced Internet materials, specifically 28 TTABVUE exhibits 9-13; 30 TTABVUE exhibits 14-24, 55, 58-62, 67-68, 31 TTABVUE exhibits 65:2, 65:3, 65:5, 65:11, 65:12, 65:14, 65:15, 65:16, 65:17, 65:18, and 39 TTABVUE exhibits 87-88.

Opposer contends that Applicant improperly seeks to rely on these materials for the truth of the matters contained therein, including to show (1) Opposer's abandonment of the DOUBLE DARE mark, (2) Opposer's failure to police its rights in the mark, (3) the public's lack of association between the mark and Opposer, (4) the public's knowledge and perception, in or about 2016-2018, that DOUBLE DARE was something from the past and no longer on television, (5) Opposer's failure to use the "TM" symbol in association with the mark, (6) Opposer's lack of standing/entitlement to a statutory cause of action, and (7) Opposer's "unclean hands" when it instituted the opposition.¹⁸⁸ (Citing Trademark Rule 2.122(e), 37 C.F.R. 2.122(e) and TBMP § 704.08.)

Applicant responds that these Internet materials were submitted, not for the truth of the content, but for what they show on their face. It further responds that

¹⁸⁷ 43 TTABVUE 83.

¹⁸⁸ 41 TTABVUE 60-61.

certain exhibits—31 TTABVUE exhibits 65:2, 65:3, 65:5, 65:11, 65:12, 65:14, 65:15, 65:16, 65:17, and 65:18—were shown to, discussed with and commented on by Marc Summers during his testimonial deposition.¹⁸⁹

Opposer, in reply, notes Applicant’s agreement that a majority of the exhibits may not be used to prove the truth of the matters asserted therein, but only for what they show on their face.¹⁹⁰ It continues to insist, however, that Applicant is attempting to rely on certain exhibits to prove the truth of the matters asserted therein:¹⁹¹

- A screen shot of a YouTube video displaying “MTV Networks” in connection with DOUBLE DARE to show lack of entitlement to a statutory cause of action; ex. 55, 28 TTABVUE 26, 30 TTABVUE 36;
- A third-party website advertising that it “creates and markets live entertainment experiences” imitating past and present game shows, including DOUBLE DARE, to show Opposer’s failure to police the mark; ex. 58, 28 TTABVUE 27, 30 TTABVUE 146-50;
- Articles about the 1970’s “Double Dare” game show hosted by the former Alex Trebek; exs. 72, 86; 28 TTABVUE 38, 45, 30 TTABVUE 68-74, 103-06;
- Press release issued by Opposer at NickPress.com about the “return” of the DOUBLE DARE show, to demonstrate that it was not being aired in any significant way prior to the 2018 reboot; ex. 74, 28 TTABVUE 39-40, 30 TTABVUE 77-79; and
- Articles about Opposer’s alleged tax avoidance, offered to demonstrate Opposer’s “unclean hands”; exs. 87-88; 39 TTABVUE 2-3, 5-9, 14-64.

¹⁸⁹ 43 TTABVUE 83-84.

¹⁹⁰ 44 TTABVUE 47.

¹⁹¹ 44 TTABVUE 48-49.

Having reviewed the subject exhibits, and the manner of their introduction, we decline Opposer's invitation to exclude them, with several exceptions. *See Philanthropist.com v. Seventh-Day Adventists*, 2021 USPQ2d 643, Appendix B, at *1-2. No matter what Applicant's intent may have been, we will "consider Internet printouts and other materials properly introduced under a notice of reliance without supporting testimony only for what they show on their face rather than for the truth of the matters asserted therein. ... [S]uch materials are frequently competent to show, on their face, matters relevant to trademark claims (such as public perception), regardless of whether the statements are true or false. Accordingly, they will not be excluded outright, but considered for what they show on their face." *Spiritline Cruises LLC v. Tour Mgmt. Svcs., Inc.*, 2020 USPQ2d 48324, at *2 (TTAB 2020) (internal citations and punctuation omitted). In other words, the exhibits may be relied upon for "what these sources state, rather than the truth of what they state...." *Schiedmayer Celesta GmbH v. Piano Factory Grp., Inc.*, 2019 USPQ2d 341894, *3, *9n.8 (TTAB 2019) *aff'd* 11 F.4th 1363, 2021 USPQ2d 913 (Fed. Cir. 2021).

Beyond that, exhibit 74, the press release issued by Opposer on NickPress.com about the "return" of the DOUBLE DARE show via the 2018 reboot,¹⁹² may be treated as an admission of a party opponent, and considered for its content. *See McGowen Precision Barrels, LLC v. Proof Research, Inc.*, n.120 (TTAB 2021) (citing Fed. R. Evid. 801(d)(2)). Furthermore, it appears that 31 TTABVUE exhibits 65:2, 65:3, 65:5, 65:11,

¹⁹² 28 TTABVUE 39-40, 30 TTABVUE 77-79. Applicant also introduced via notice of reliance Opposer's September Form 10-K filing, which mentioned inter alia "the return of the Nick classic *Double Dare*...." Applicant's NOR ex. 66, 30 TTABVUE 54. We treat this, as well, as the admission of a party opponent, and overrule Opposer's objection to its introduction. 41 TTABVUE 68-69.

65:12, 65:14, 65:15, 65:16, 65:17, and 65:18 were introduced as “part of the deposition of Marc Summers, conducted April 14, 2021 as part of Applicant’s testimony period. The documents maintain the same exhibit numbers as used in that deposition....”¹⁹³ Opposer does not contest this manner of introduction. We will therefore consider this documentary evidence.

Two exhibits, however, warrant special attention. They concern Opposer’s alleged tax avoidance, and are offered by Applicant to demonstrate Opposer’s “unclean hands.”¹⁹⁴ As Opposer correctly observes, these documents are irrelevant to the issues in this proceeding.¹⁹⁵ We sustain Opposer’s objection to these two exhibits, and give them no consideration.

C. Opposer’s Objections to Applicant’s Reliance on Portions of Mr. Armstrong’s Discovery Deposition

Opposer introduced relevant excerpts of its discovery deposition of Applicant’s president and CEO, Charles Armstrong, indicating the relevance of each excerpt.¹⁹⁶ Applicant, in turn, introduced excerpts from that deposition, also indicating the relevance of each excerpt.¹⁹⁷ Applicant’s excerpts fell into two broad categories: Applicant’s intent to use the DOUBLE DARE mark and Opposer’s abandonment thereof.

Trademark Rule 2.120(k)(1) provides that a discovery deposition of an officer, director or managing agent of a party such as Armstrong “may be offered in evidence

¹⁹³ Applicant’s first NOR, 28 TTABVUE 29.

¹⁹⁴ Applicant’s second NOR, exs. 87-88; 39 TTABVUE 2-3, 5-9, 14-64.

¹⁹⁵ 44 TTABVUE 49.

¹⁹⁶ Opposer’s NOR, ex. 2, 25 TTABVUE 2-3, 47-106.

¹⁹⁷ Applicant’s NOR, ex. 2, 28 TTABVUE 2-5, 61-81.

by an adverse party,”—in this case, Opposer. 37 C.F.R. § 2.120(k)(1).

Trademark Rule 2.120(k)(4) further provides that:

If only part of a discovery deposition is submitted and made part of the record by a party, an adverse party may introduce under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party. A notice of reliance filed by an adverse party must be supported by a written statement explaining why the adverse party needs to rely upon each additional part listed in the adverse party’s notice, failing which the Board, in its discretion, may refuse to consider the additional parts.

37 C.F.R. § 2.120(k)(4).

Opposer argues that Applicant failed to provide a written statement explaining why it needed to rely on each additional excerpt from Armstrong’s deposition to render Opposer’s excerpts not misleading.¹⁹⁸ Applicant admits that it did not include such a written statement, but (i) notes that Opposer did not raise this objection earlier, and (ii) urges the Board not to exercise its discretion to exclude its excerpts from the Armstrong deposition.¹⁹⁹

Applicant’s points are well taken.

First, an objection to a notice of reliance on the ground that the notice does not comply with the procedural requirements of the particular rule under which it was submitted generally should be raised promptly. If a party fails to raise an objection of this nature promptly, the objection may be deemed waived, unless the ground for objection is one that could not have been cured even if raised promptly. *See Barclays Capital Inc. v. Tiger Lily Ventures Ltd.*, 124 USPQ2d 1160, 1163 (TTAB 2017)

¹⁹⁸ 41 TTABVUE 62.

¹⁹⁹ 43 TTABVUE 85-86.

“Objections to testimony or to a notice of reliance grounded in asserted procedural defects are waived unless raised promptly, when there is an opportunity to cure.”); *see generally* TBMP §§ 707.02(b)(2), 707.04.

Had Opposer timely objected to Applicant’s Notice of Reliance, Applicant could have cured the defects by explaining which of Opposer's excerpts it intended to clarify, explain or rebut. By waiting to raise these objections in its brief, Opposer has waived its right to object to Applicant’s notice of reliance on these excerpts.

Second, Applicant’s deposition excerpts should in fairness be considered along with Opposer’s excerpts. *See Wear-Guard Corp. v. Van Dyne-Crotty Inc.*, 18 USPQ2d 1804, 1806 n.2 (TTAB 1990) (Board exercises discretion to consider entire discovery deposition transcripts). The excerpts concerning Applicant’s intent to use the DOUBLE DARE mark demonstrate how that issue was tried by the implied consent of both parties, despite Opposer’s failure to plead the claim earlier. And the excerpts concerning Opposer’s putative abandonment of DOUBLE DARE offer context to the novel and complex factual and legal issues underlying that claim. *See City Nat’l Bank v. OPGI Mgmt. GP Inc./Gestion OPGIInc.*, 106 USPQ2d 1668, 1671 (TTAB 2013) (counter-designations of deposition “clearly offer context.”). Accordingly, “[w]e find that the interests of fairness are served best by considering the additional excerpts of the ... discovery deposition submitted by applicant under notice of reliance.” *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1352 n.13 (TTAB 2014). Opposer’s objections are overruled.²⁰⁰

²⁰⁰ Duplicative excerpts will be disregarded. *Australian Therapeutic Supplies Pty. Ltd.v. Naked TM, LLC*, 129 USPQ2d 1027, 1030 n.29 (TTAB 2018) (party may rely on testimony from a discovery deposition already made of record by adverse party-no need to resubmit).

D. Opposer's Objections to the Leib Declaration

Applicant has introduced the January 20, 2019 declaration of its counsel, Howard Leib, filed in the parties' prior civil litigation.²⁰¹ Paragraph 17 of the declaration describes a conversation Mr. Leib had with Marc Summers concerning Mr. Summers's August 2018 meeting with Cyma Zarghami, then president of Nickelodeon. Mr. Leib declares that "according to Mr. Summers, Ms. Zarghami rejected the idea of reviving Double Dare, stating that Double Dare was a dead concept at Nickelodeon, or words to that effect."²⁰²

Opposer maintains that the declaration should be accorded no probative value whatsoever because (i) it is from Applicant's attorney, (ii) it is from another proceeding, and (iii) it constitutes hearsay.²⁰³

Applicant (i) admits that the declaration was not created for this litigation but was, rather, submitted in the prior District Court litigation, (ii) argues that it is submitted to impeach Mr. Summers's deposition testimony, and (iii) contends is a procedural objection that should have been raised earlier.²⁰⁴

We sustain the objection on the ground that the declaration has not been properly introduced. Testimony from another proceeding between the same parties or their privies may be admitted in an inter partes proceeding on motion granted by order of the Board. Trademark Rule 2.122(f), 37 C.F.R. § 2.122(f). *See, e.g., Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1467 n.4 (TTAB 2016) (granting motions

²⁰¹ Leib Declaration, 30 TTABVUE 45-47.

²⁰² Leib decl. ¶ 17C, 30 TTABVUE 46-47.

²⁰³ 41 TTABVUE 62-64; 44 TTABVUE 51-52.

²⁰⁴ 43 TTABVUE 86.

for leave to use testimony and evidence from civil action and considering as part of evidence on trial). *See generally* TBMP §§ 530, 704.13 (“A motion for leave to use testimony from another proceeding should be accompanied by a copy of the testimony, and accompanying exhibits, sought to be introduced.”). The Leib declaration meets none of these requirements for admissibility. It was not offered by motion, there is no order from the Board approving its use, and it does not constitute testimony. “[T]he Board has construed the term “testimony,” as used in Trademark Rule 2.122(f), as meaning only trial testimony, or a discovery deposition which was used, by agreement of the parties, as trial testimony in the other proceeding.” *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1034-35 (TTAB 2010) (citing TBMP §§ 530 and 704.13). The prior civil suit was dismissed for lack of subject matter jurisdiction, and never went to trial. Therefore, we give this declaration no consideration. We hasten to add that its exclusion does not affect the outcome.

E. Armstrong Testimonial Declaration

In his testimonial declaration, Charles Armstrong declared inter alia that:

Mr. Summers told me, in the presence of Edward Bralower, that Ms. Zarghami had told him that Viacom had no interest at all in Double Dare, that both he and Double Dare were too old, and that Nickelodeon would not be putting either of them on the air.²⁰⁵

Opposer objects that “[t]o the extend that this testimony is offered to prove the truth of what Ms. Zarghami told Mr. Summers, that is clear hearsay and excludable under Fed. R. Evid. 801.”²⁰⁶

²⁰⁵ Armstrong decl. ¶ 4, 29 TTABVUE 5.

²⁰⁶ 41 TTABVUE 63.

As CEO of Nickelodeon, Ms. Zarghami's purported statement to Mr. Summers may be taken as a statement or admission of an agent of a party opponent. Fed. R. Evid. 801(d)(2). But Mr. Summers's purported statement to Mr. Armstrong, if offered for the truth of the matter asserted, would clearly be hearsay, and will not be considered for that purpose. Fed. R. Evid. 801(c), 802. However, the statement is, as noted earlier, admissible to support Mr. Armstrong's claim of bona fide intent to use the DOUBLE DARE mark in connection with entertainment programming, *see* 30B Wright & Miller, FED. PRAC. & PROC. EVID. § 6719 (2021 ed.) (out of court statement admissible "for the purpose of explaining what the witness was thinking, at the time or what motivated him to do something"). Furthermore, it is admissible to show how much it varies from Mr. Summers's testimony, thereby bearing on the witnesses' credibility. For those limited purposes, we will consider the statement.

F. Testimonial Declarations of Applicant's Other Witnesses

Applicant introduced the testimonial declarations of Ernie Anastos, Edward Bralower, Dana Calderwood, and Michael Klinghoffer, witnesses whose testimony, from varying perspectives, supported Armstrong's perception that Opposer had "dropped" the DOUBLE DARE mark by nonuse and Armstrong's contention that he demonstrated a bona fide intent to "pick up" and use the mark in connection with entertainment programming.²⁰⁷

Opposer argues that these declarations should be excluded from evidence because these witnesses were not identified in Applicant's initial disclosures.²⁰⁸ Applicant

²⁰⁷ 29 TTABVUE.

²⁰⁸ Opposer's brief, 41 TTABVUE 65-68.

admits that it did not identify these four witnesses in its initial disclosures, but insists (without contradiction) that it identified them in its pretrial disclosures. Moreover, it maintains, Armstrong previously identified them in his deposition, taken in the course of discovery. Applicant contends that Opposer's motion to exclude these witnesses' testimony is untimely and unwarranted.²⁰⁹ We agree on both grounds.

First, Opposer's motion is untimely. Opposer's objection—that Applicant failed to supplement its initial disclosures—is a procedural one. *See Kate Spade LLC v. Thatch, LLC*, 126 USPQ2d 1098, 1101 (TTAB 2018) (prior to trial, disclosures are evaluated only for compliance with the procedural rules). A procedural objection of this sort must be raised promptly by a motion to strike. *Id.* at 1099; *MokeAmerica v. Moke USA*, 2020 USPQ2d 10400 at *4, 6 (motion to strike must be seasonably raised). A prompt filing, made, at the latest, within 20 days after a declaration is filed, allows the proffering party to cure the alleged defect or argue that it should be overruled. *Id.* at *6. Opposer, however, waited until its main brief to interpose its objection to these witnesses' testimony; because it did not raise this procedural objection in a timely manner, its objection is waived or forfeited. *Id.* at *4. *See also Int'l Dairy Foods v. Interprofession du Gruyère*, 2020 USPQ2d 10892, at *3-4. *See generally* TBMP §§ 707.03(a), 707.04.

Second, even if Opposer had seasonably moved to strike these witnesses' testimonial declarations, it would not have prevailed.

Opposer argues that “[a] party who fails to make a required initial disclosure ‘is not allowed to use that information or witness to supply evidence on a motion, at a

²⁰⁹ TTABVUE 87-89.

hearing, or at trial.’ Fed.R.Civ.P. 37(c)(1); T.B.M.P. § 527.01(e).” *Citing Spier Wines (PTY) Ltd. v. Ofer Z. Shepherd*, 105 USPQ2d 1239, 1241 (TTAB 2012) (striking testimony from a previously undisclosed witness).

This omits key language from TBMP § 527.01(e), which provides that “A party that fails to provide information, or provides an untimely supplement, **may** be precluded from using that information or witness at trial **unless the failure to disclose was substantially justified or is harmless.**” (emphasis added). To determine whether a failure to disclose is substantially justified or harmless, the Board is guided by the five-factor *Great Seats* test: 1) the surprise to the party against whom the evidence would be offered; 2) the ability of that party to cure the surprise; 3) the extent to which allowing the testimony would disrupt the trial; 4) importance of the evidence; and 5) the nondisclosing party’s explanation for its failure to disclose the evidence. *Great Seats Inc. v. Great Seats Ltd.*, 100 USPQ2d 1323, 1327 (TTAB 2011) *cited in Spier Wines*, 105 USPQ2d at 1242.

Here, we find that the timing of Applicant’s disclosures was substantially justified and, in any event, harmless. Opposer can hardly be heard to complain of “surprise” when it raised the claim of lack of bona fide intent to use the DOUBLE DARE mark so late in the proceeding. Because the issue of bona fide intent was not originally pleaded in the Notice of Opposition, filed in October 2018, Applicant could not have been expected to address it in its initial disclosures. *See* TBMP § 408.01(b) (“The initial disclosure requirement is intended to provide for the disclosure of names of potential witnesses and basic information about documents and things that a party may use **to support a claim or defense.**”) (emphasis added). The issue appears to

have arisen during the deposition of Mr. Armstrong, taken two years later on October 7, 2020, about three weeks before the close of discovery.²¹⁰ Opposer's main brief relies primarily on that deposition to support its claim of lack of bona fide intent.²¹¹ During the deposition, Mr. Armstrong identifies all four witnesses as persons who became aware of his plan to use the mark through meetings and telephone calls.²¹²

Applicant's pretrial disclosures were due March 4, 2021, and there is no dispute that it identified the four witnesses then. It introduced the subject witness declarations shortly thereafter, on April 19, 2021.²¹³ It did not supplement its initial disclosures beforehand, as it should have, TBMP § 408.03, but it offered to consent to a 30-day extension of time if Opposer wished to depose them.²¹⁴ Opposer declined the offer.²¹⁵ Opposer argues that "To cure the defect in Armstrong's disclosure obligations, discovery would have had to be re-opened so that Viacom could seek discovery from and relating to the witnesses, and have the opportunity to depose them. This would have significantly delayed trial and prejudiced Viacom."²¹⁶ This excuse does not ring true. Opposer had already delayed this proceeding by a year with its civil action, and it filed consented motions for extension of time in this proceeding totaling 180 days. The witnesses had been named, albeit not listed as potential

²¹⁰ 28 TTABVUE 62 et seq.

²¹¹ Opposer's brief, 42 TTABVUE 55.

²¹² Armstrong dep. 42:21-45:4, 108:16-19, 28 TTABVUE 63-66; 43 TTABVUE 92.

²¹³ 29 TTABVUE.

²¹⁴ Applicant's brief, ex. 3, April 19, 2021 email correspondence between counsel. 42 TTABVUE 98-99.

²¹⁵ *Id.*

²¹⁶ 44 TTABVUE 55.

witnesses, six months earlier, in the Armstrong deposition. Opposer could have elected to cross-examine the witnesses—under protest, if it saw fit—followed by a motion to strike the testimony. TBMP § 702.01. But it did not do so. *See WeaponXPerformance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1037 (TTAB 2018) (opposer declined to cross-examine). Opposer’s objection “elevates form over substance, and is not well taken.” *Id.*

At the end of the day, the four witnesses’ declaration testimony proved to be more important to Opposer than Applicant, as they helped establish that the bona fide intent issue had indeed been tried by both parties by implied consent. So even though Applicant failed to supplement its initial disclosures, the omission was harmless—and, in fact, helpful. TBMP § 527.01(e). We decline to preclude Applicant from introducing these witnesses’ testimony at trial. Instead, we take this testimony into account, and consider it for what it is worth, subject to any inherent limitations it may have.²¹⁷

²¹⁷Opposer also raises a flurry of objections to the substantive content of the witnesses’ declarations. Opposer objects to Anastos and Calderwood’s conclusion that there was a “genuine intent” to air a program under the DOUBLE DARE mark. 41 TTABVUE 65-67. We have already discounted the conclusory nature of this testimony. *See Pierce-Arrow Society v. Spintek Filtration, Inc.*, 2019 USPQ2d 471774, at *2 (TTAB 2019) (“the Board disregards opinion testimony regarding the ultimate disposition of the claims asserted”). Opposer objects to Bralower’s testimony as to what Mr. Summers heard from Ms. Zarghami of Nickelodeon. 41 TTABVUE 66. We have already discounted the hearsay nature of such testimony, and consider it only as it bears on the credibility of the witnesses and Applicant’s bona fide intent to use the DOUBLE DARE mark. Calderwood’s testimony that “Nickelodeon had no interest in reviving the program” is limited to his personal experience pitching Double Dare, along with two other proposed programs, to Mandel Hagan at Nickelodeon in 2014. Calderwood decl. ¶¶ 10-12, 29 TTABVUE 20. Opposer objects that Klinghoffer typed the contents of two emails into his declaration instead of supplying copies of the emails themselves, in violation of the best evidence rule. Klinghoffer decl. ¶¶ 7, 9, 29 TTABVUE 26-27. Fed. R. Evid. 1005. 41 TTABVUE 68. “The ‘best evidence rule’ is a common law proposition that has been codified in Rule 1002 of the Federal Rules of Evidence, which states: ‘To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.’ However, the rule has been

G. Other “Irrelevant Documents”

Opposer objects to Applicant’s reliance on “Irrelevant Documents, Wholly Unrelated to the DOUBLE DARE mark or this Proceeding.”²¹⁸ With the exception of exhibits 87 and 88 to Opposer’s second notice of reliance, which we have already excluded, “we have considered the evidence, keeping in mind the objections, and have accorded whatever probative value the testimony and evidence merits.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1047 (TTAB 2017). So too with the deposition testimony of Marc Summers; Opposer’s objections thereto are overruled.²¹⁹ The three exhibits that Applicant submits with its brief—the first two comprising sections of the Armstrong deposition in which he identifies the four witnesses identified in Applicant’s pretrial disclosures, and the third containing correspondence between the parties’ counsel relating to those witnesses²²⁰—will also be considered, as they bear on Opposer’s evidentiary objections.

described as ‘one of preferences, not absolute exclusion.’ 6 Weinstein’s Federal Evidence Section 1004.01 (2nd Ed. 1997).” *Mag Instr., Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1707 (TTAB 2010). Although it would have been preferable for Mr. Klinghoffer to attach copies of the emails to his declaration, Opposer did not press the point by noting his deposition duces tecum. We consider this “documentary evidence for whatever probative value it may have, taking into account ‘any inherent limitations’ in the evidence.” *Sabhmani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, *10-11 (TTAB 2021).

²¹⁸ 41 TTABVUE 69-70.

²¹⁹ 41 TTABVUE 71.

²²⁰ 43 TTABVUE 91-100.

Applicant’s Objections to Opposer’s Evidence

Applicant, not to be outdone, has filed a litany of objections to Opposer’s witness declarations and notices of reliance.²²¹ Opposer has responded thereto.²²²

A. Opposer’s Witness Declarations

The Kingsley Declaration—Applicant objects to exhibits 9 and 12 through 14 to the Declaration of Thomas Kingsley, Opposer’s Director of the Nickelodeon Experience. Exhibit 9 is a spreadsheet that Mr. Kingsley attests has been created and kept in the regular course of Opposer’s business showing gross sales of DOUBLE DARE branded goods marketed by its licensees from 2009 through 2019.²²³ Applicant objects that only three of the license agreements relating to these sales of goods have been provided, and asks us to “disregard any proofs related to non-produced licenses.”²²⁴ Mr. Kingsley has attested to the accuracy of the spreadsheet, and Opposer has provided three representative examples of license agreements. That suffices to support the accuracy of the figures summarized in the spreadsheet. *Southwestern Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1014 (TTAB 2015) (summary of revenues properly authenticated by witness and admissible as business records and summaries thereof). *See also* Fed. R. Evid. 1006 (summaries admissible to prove content). There is no indication that Applicant sought to examine the sales figures summarized in the spreadsheet, much less all the license agreements that gave rise to the sales. The objection is overruled.

²²¹ 43 TTABVUE 59 et seq.

²²² 44 TTABVUE 28 et seq.

²²³ Kingsley decl. ¶¶ 16-18, 22 TTABVUE 8-9, 197-202, 44 TTABVUE 38.

²²⁴ 43 TTABVUE 74.

Exhibit 14 to the Kingsley declaration is a spreadsheet summarizing consumer purchases of individual episodes and entire seasons of DOUBLE DARE via digital downloads, from October 2014 through 2018.²²⁵ Mr. Kingsley avers that the spreadsheet was “compiled from data kept by Viacom in the regular course of its business by individuals responsible for monitoring [download-to-own] transactions....”²²⁶ Opposer observes, correctly, that “[t]his places the spreadsheet squarely within the hearsay exception of Federal Rule of Evidence 803(6), which allows for admission if ‘the record was kept in the course of a regularly conducted activity of a business . . . making the record was a regular practice of that activity . . . [and] these conditions are shown by testimony of . . . a qualified witness’”.²²⁷ See Fed. R. Evid. 803(6), *cited in Christian Faith Fellowship Church v. Adidas*, 120 USPQ2d at 1642.

Applicant objects that that data was, of necessity, obtained from Opposer’s “digital distribution partners,” Google, Amazon, and Apple iTunes, and is therefore based on the business records of those third parties, which is hearsay.²²⁸ However, Federal Rule of Evidence 803(6)(E) states that a business record will be admitted as long as “the **opponent** does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.” *MokeAmerica*, 2020 USPQ2d 10400 at *4 (quoting Fed. R. Evid. 803(6)(E)) (emphasis added). In other words, it was Applicant’s burden to show that the sources of information—Google,

²²⁵ Kingsley decl. ¶¶ 24-28, 22 TTABVUE 11-13, 264-391.

²²⁶ Kingsley decl. ¶ 26, 22 TTABVUE 12.

²²⁷ 44 TTABVUE 40.

²²⁸ 43 TTABVUE 75-76.

Amazon, and Apple iTunes—or the circumstances of preparation indicated a lack of trustworthiness. It did not meet this burden. It did not seek to depose Mr. Kingsley, nor did it submit any evidence showing that the records of sales transmitted for years between these sophisticated corporations were anything but trustworthy.

Applicant also objects that exhibit 14 purports to show sales from licensees whose licenses have not been provided to the Board. As before, there is no evidence that Applicant sought production or inspection of any such agreements. Applicant's objection to Kingsley exhibit 14 is overruled.

Kingsley exhibits 12 and 13 are instruction manuals for the DOUBLE DARE: The Game board game, printed in 1987 and 2001, respectively.²²⁹ Applicant variously objects to these exhibits on grounds that they are irrelevant, comprise hearsay, and cannot be used to prove use of the Mark in association with board games. The objections are overruled. Suffice it to say, “we simply accord the evidence whatever probative value it deserves, if any at all ... Ultimately, the Board is capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence in this specific case, including any inherent limitations.” *Spotify AB v. U.S. Software Inc.*, 2022 USPQ2d 37, *6 (TTAB 2022) (quoting *Hunt Control Sys. Inc. v. Koninkijke Philips Elecs. N.V.*, 98 USPQ2d 1558, 1564 (TTAB 2011)).

The objections to the Kingsley exhibits are thus overruled.

The Banks Declaration—The testimonial declaration of Brian Banks, Opposer's Vice President and Executive in Charge of Production for Live Action, included two categories of exhibits to which Applicant objects.

²²⁹ Kingsley decl. ¶¶ 21-22, 24 TTABVUE 10-11, 253-262.

Banks exhibit 8 is a Nielsen ratings report showing viewership numbers for the premier of the DOUBLE DARE Reunion Special on November 23, 2016.²³⁰ Applicant contends that it is irrelevant and hearsay. The exhibit is relevant to show the commercial fame of DOUBLE DARE in connection with entertainment programming and Opposer's use of the mark in commerce. It thus supports Opposer's likelihood of confusion claim and helps refute Applicant's abandonment defense. It is admissible under the business records exception to the hearsay rule because Opposer relies on the accuracy of the document, and the longstanding use of Nielsen ratings to assess viewership indicates its trustworthiness. Fed. R. Evid. 803(6); *Christian Faith Fellowship Church v. Adidas*, 120 USPQ2d at 1643 ("When a business relies on a document it has not itself prepared, two factors bear on the admissibility of the evidence as a business record: [1] that the incorporating business rely upon the accuracy of the document incorporated[;] and [2] that there are other circumstances indicating the trustworthiness of the document.") (internal punctuation omitted). See *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305-09 (Fed. Cir. 2002) (fame of mark assessed indirectly); *Weider Pubs., LLC v. D & D Beauty Care Co., LLC*, 109 USPQ2d 1347, 1354 (TTAB 2014 (ratings relevant to fame); *Califon Prods., Inc. v. Stupak*, 2004 WL 390937 (TTAB 2004) (considering Nielsen ratings data in assessing fame of WHEEL OF FORTUNE mark) (nonprec.).

Banks exhibits 13-23 refer to Opposer's 2018 DOUBLE DARE reboot.²³¹ Applicant objects that "these exhibits are dated after Applicant's priority date and address

²³⁰ Banks decl. ¶ 22, 21 TTABVUE 10, 167-71.

²³¹ Banks decl. ¶¶ 27-36, 21 TTABVUE 13-18, 198-262.

matters that occurred following Applicant's priority date and are, therefore, irrelevant to Opposer's obligation to establish a priority date earlier than Applicant's priority date.²³² As noted, however, this subsequent use is sufficiently contemporaneous with and linked to Applicant's prior uses of DOUBLE DARE to evidence its intent to continue using the mark. *See Peterson v. Awshucks*, 2020 USPQ2d 11526 at *10.

The objections are overruled.

The Acevedo Declaration—Joann Acevedo, Opposer's Vice President of Consumer Products, testified about Opposer's subsidiaries, affiliates and divisions that produced DOUBLE DARE branded entertainment.²³³ Her testimony is relevant to establish that these entities' use of the DOUBLE DARE mark has inured to Opposer's benefit.

Applicant objects that her testimony "concerning the relationship of Opposer with other entities that have been identified in this proceeding is not proper rebuttal testimony. Opposer is required to establish its standing in this proceeding as part of its case in chief. Opposer did not do so. The fact that it failed or neglected to do so does not entitle it to raise the issue on rebuttal."²³⁴

However, Applicant introduced exhibits in its notice of reliance designed to show that the entities owning copyright in DOUBLE DARE episodes or contracting for Marc Summers's hosting services were MTV Networks, G.P.I., Uptown Productions,

²³² 43 TTABVUE 76.

²³³ Acevedo decl. ¶¶ 1-2, 4-14, 34 TTABVUE 2-4.

²³⁴ 43 TTABVUE 74-75.

Inc., and New Games Productions, Inc., not Opposer.²³⁵ Applicant contended that these exhibits related “to the issue of Opposer’s standing to bring this opposition and to Opposer abandonment of the mark.”²³⁶

In response, Ms. Acevedo explained Opposer’s relationship to these entities:

The ViacomCBS family of companies is comprised of several wholly owned subsidiaries and affiliates, including Viacom International Inc., which in turn has a number of its own wholly owned subsidiaries, including New Games Productions Inc., Games Productions Inc. and Uptown Productions Inc. In addition, Viacom International Inc. operates a division called ViacomCBS Domestic Media Networks that was formerly known as MTV Networks.²³⁷

“The function of rebuttal evidence is to explain, repel, counteract, or disprove the evidence of the adverse party.’ *Apollo Med. Extr. Techs., Inc. v. Med. Extr. Techs., Inc.*, 123 USPQ2d 1844, 1847 (TTAB 2017) (citing *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 116 USPQ2d 1869, 1883 (Fed. Cir. 2015)), *rev’d* on other grounds by stipulation pursuant to settlement agreement, No. 3:17-cv-02150-AJB-MSB (S.D. Cal. ... 2021). ‘The fact that evidence might have been offered in chief does not preclude its admission as rebuttal.’” *Philanthropist.com v. Seventh-Day Adventists*, 2021 USPQ2d 643, Appendix B, at *3 (quoting *Data Packaging Corp. v. Morning Star, Inc.*, 212 USPQ 109, 113 (TTAB 1981)). We find that Ms. Acevedo’s testimony constitutes proper rebuttal, and therefore overrule Applicant’s objection.

Applicant further objects that Ms. Acevedo’s declaration fails to lay a proper foundation establishing her personal knowledge of the matters to which she testified:

²³⁵ Applicant’s NOR ¶¶ 55 ex. 55, 65 exs. 5, 7-9, 28 TTABVUE 26, 30-31.

²³⁶ Applicant’s NOR, 28 TTABVUE 31. Opposer’s reply brief, 44 TTABVUE 43.

²³⁷ Acevedo decl. ¶ 4, 34 TTABVUE 3.

“Nothing in her position as “Vice President of Consumer Products at Viacom International, Inc,” (34 TTABVUE ¶ 1) or her prior position as “Director of Home Furnishings for Nickelodeon” (34 TTABVUE ¶ 2) would mandate, or even indicate, any knowledge of or relationship with New Games Productions, Inc., Games Productions, Inc., or Uptown Productions, Inc.”²³⁸ Applicant complains that the information set forth in paragraphs 4 through 9 and 13 of the Acevedo declaration, in which she describes how these entities produced DOUBLE DARE events for Opposer, fall “outside the stated authority of Declarant. There is no basis set out for Declarant’s knowledge of the facts reported.”²³⁹

Applicant’s objections are untimely and unavailing.

First, “[a]n objection to foundation raised for the first time in a trial brief is untimely because the party offering the testimony (whether by deposition, affidavit or declaration) does not have the opportunity to cure the alleged defect.” *MokeAmerica*, 2020 USPQ2d 10400, at *4-5. Applicant failed to file a timely motion to strike all or part of her testimony, and has waived this objection. *Int’l Dairy Foods v. Interprofession du Gruyère*, 2020 USPQ2d 10892, at *4.

Second, Federal Rule of Evidence 602, made applicable to Board proceedings by Trademark rule 2.122(a), 37 C.F.R. § 2.122(a), states in pertinent part that “[e]vidence to prove personal knowledge may consist of the witness’s own testimony.” Fed. R. Evid. 602 *quoted in Sabhnani v. Mirage Brands*, 2021 USPQ2d 1241, at *11.

In her declaration, signed in 2021, Ms. Acevedo attested that:

1. I am Vice President of Consumer Products at Viacom International Inc.

²³⁸ 43 TTABVUE 77.

²³⁹ 42 TTABVUE 80.

(“Viacom”). I submit this declaration based on personal knowledge of the matters stated herein and the business records of Viacom, except to the extent the context indicates otherwise.

2. I have been employed by the ViacomCBS family of companies since 2003. I joined as Director of Home Furnishings for Nickelodeon in 2008 and have held a series of positions before assuming my current role as Vice President.²⁴⁰

We find that her foundational testimony—particularly her averment of personal knowledge, backed by her length of service in positions of responsibility—suffices to establish her personal knowledge of the subjects to which she testified. *See Sabhnani v. Mirage Brands*, 2021 USPQ2d 1241, at *11-12. If Applicant doubted her personal knowledge of the matters to which she attested, it could have cross-examined her, but it declined to do so, and its objection is overruled. *See Spotify v. U.S. Software*, 2022 USPQ2d 37, at *6.

B. Opposer’s Notices of Reliance

Opposer’s Notice of Reliance— Applicant next interposes a prolonged and repetitive litany of objections to virtually every shred of evidence Opposer has introduced in its Notice of Reliance. Of the 65 exhibits in Opposer’s Notice of Reliance,²⁴¹ Applicant objects to all but seven, finding fault with exhibits 5-60, and 64-65.²⁴² Opposer has responded to the objections.²⁴³

Applicant’s objections fall into three general categories: (1) relevance under Rules 401 and 402 of the Federal Rules of Evidence, (2) hearsay under Rules 801 and 802

²⁴⁰ Acevedo decl. ¶¶ 1-2, 34 TTABVUE 3.

²⁴¹ Opposer’s NOR, 25 TTABVUE.

²⁴² Applicant’s brief, 43 TTABVUE 59-74.

²⁴³ Opposer’s reply brief, 44 TTABVUE 28-37.

of the Federal Rules of Evidence, and (3) argument regarding the probative significance of the evidence.

Applicant argues that virtually every exhibit in Opposer's Notice of reliance is irrelevant. Its first reason is chronological: it contends that Opposer's exhibits evidencing use of the DOUBLE DARE mark are either too early (dating from 1987),²⁴⁴ too late (dating after Applicant's subject application)²⁴⁵ or undated.²⁴⁶

We find that the exhibits' dates do not detract from their relevance. Opposer's evidence of its longstanding use of the DOUBLE DARE mark supports its contention that the mark is commercially strong, with recognition and goodwill among relevant consumers: families with young children. *See generally Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012) (length and scope of use of mark is relevant to its commercial strength). And its evidence of use of the DOUBLE DARE mark, both before and after Applicant's filing date, is relevant to counter Applicant's affirmative defense of abandonment. *Swatch v. Berger*, 108 USPQ2d at 1474; *Peterson v. Awshucks*, 2020 USPQ2d 11526, at *10. Applicant's contention that certain Internet screen shots were undated is waived, as Applicant failed to raise it promptly. *Philanthropist.com v. Seventh-Day Adventists*, 2021 USPQ2d 643, Appendix B, at *1. And it is inaccurate, as Opposer did provide the relevant dates in the header or footer of each page of the exhibits.²⁴⁷

²⁴⁴ *See, e.g.*, Applicant's objections to Opposer's NOR exs. 5-24 (from 1987 through 2013), Applicant's reply brief, 43 TTABVUE 59-63.

²⁴⁵ *See, e.g.*, Applicant's objections to Opposer's NOR exs. 43-46, 51-54 (from 2018 through 2020), 43 TTABVUE 68-72.

²⁴⁶ *See, e.g.*, Applicant's objections to Opposer's NOR exs. 47-50, 55-59, 43 TTABVUE 69-73.

²⁴⁷ Opposer's reply brief, 44 TTABVUE 37. 25 TTABVUE 312-34, 366-84.

Applicant's second reason for finding the Opposer's Notice of Reliance exhibits irrelevant is their content: according to Applicant, they do not show Opposer's use of the DOUBLE DARE mark on the goods or services at issue.²⁴⁸ We disagree.

Opposer's Notice of Reliance states the relevance of each of its exhibits, as required.²⁴⁹ Trademark Rule 2.122(g), 37 C.F.R. § 2.122(g); TBMP § 704.02. Many of the exhibits, true to their description, show Opposer's DOUBLE DARE mark used on or in connection with various forms of entertainment programming, as well as on goods.²⁵⁰ The exhibits thus complement and illustrate Opposer's declarations describing how Opposer has used the mark in commerce over the years. But the exhibits are relevant in other ways, as well. Exhibits showing use of DOUBLE DARE by others, such as the band Good Charlotte, evidence the fame of DOUBLE DARE as a mark worth parodying.²⁵¹ *See In re Serial Podcast*, 126 USPQ2d at 1076 (“[A] mark has to be well known in the first place to be parodied.”). Unsolicited media coverage shows the commercial strength of the DOUBLE DARE mark.²⁵² *Chutter v. Great Mgmt. Grp.*, 2021 USPQ2d 1001, at *30. And USPTO records show how Opposer has policed the DOUBLE DARE mark.²⁵³ “While couched as relevance objections, [Applicant's] protestations actually go to the weight we should afford this evidence.”

²⁴⁸ *See, e.g.*, Applicant's objections to Opposer's NOR exs. 19-33, 35-38, 40-54, 58, 60, 43 TTABVUE 61-74.

²⁴⁹ Opposer's NOR, 25 TTABVUE 5-23.

²⁵⁰ *See, e.g.*, Opposer's NOR exs. 19-21, 28, 33, 40, 41, 43, 47, 48, 49, 60, 25 TTABVUE 163-84, 205-13, 234-42, 285-89, 299-300, 312-25, 385-91.

²⁵¹ Opposer's NOR exs. 12-13, 40, 25 TTABVUE 140-145, 286.

²⁵² *See, e.g.*, Opposer's NOR exs. 7, 10, 14-15, 24, 28, 36, 25 TTABVUE 126-27, 134-36, 146-53, 190-94, 205-07, 252-54.

²⁵³ *See, e.g.*, Opposer's NOR exs. 61-62, 25 TTABVUE 398-418.

Nestlé S.A. v. Taboada, 2020 USPQ2d 10893, at *7. And we can weigh the evidence appropriately, according to the probative value, if any, it is due.

Applicant argues repetitively that to the extent Opposer seeks to rely on the content of website screen shots, articles, or any other materials introduced via notice of reliance to prove any aspect of its case, that is hearsay.²⁵⁴ Opposer counters that the exhibits are offered for what they show on their face, not for the truth of the matters asserted therein, such that they are not hearsay under Fed. R. Evid. 801 and are permitted under TBMP § 704.08(b).²⁵⁵

Applicant's objections are not well taken because this evidence is used and considered only for what it shows on its face, rather than for the truth of the matters asserted therein. *See DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *2; *Spiritline Cruises v. Tour Mgmt. Svcs.*, 2020 USPQ2d 48324, at *2-3. As the Board has declared:

We do not treat such materials as proving the truth of the matter asserted in them. However, such publications can be used to demonstrate promotion of the mark by its owner, public perceptions of the mark by others, and other issues relevant to this proceeding.

...

such materials are frequently competent to show, on their face, matters of relevance to trademark claims (such as public perceptions), regardless of whether the statements are true or false.

Harry Winston, Inc. v. Bruce Winston Gem Corp., 111 USPQ2d 1419, 1427-28

(TTAB 2014) *quoted in Int'l Dairy Foods v. Interprofession du Gruyère*, 2020 USPQ2d 10892, at *4.

Accordingly, the exhibits will not be excluded outright, but considered for what they show on their face. For example, as noted, unsolicited media coverage shows the

²⁵⁴ *See, e.g.*, Applicant's objections to Opposer's NOR exs. 5-56, 58, 43 TTABVUE 59-74.

²⁵⁵ Opposer's reply brief, 44 TTABVUE 29 et seq.

commercial strength of the DOUBLE DARE mark. *Chutter v. Great Mgmt. Grp.*, 2021 USPQ2d 1001, at *30. And press releases, advertisements, and the like show that entertainment services and goods were being advertised under the DOUBLE DARE mark; like pieces of a puzzle, that evidence may be considered together with testimonial declarations to establish that the goods and services were actually being offered under the mark. *W. Fla. Seafood, v. Jet Rests.*, 31 USPQ2d at 1664 n.7.

Opposer's Rebuttal Notice of Reliance—Applicant further notes that some of Opposer's Notice of Reliance exhibits could support Applicant's positions in this proceeding.²⁵⁶ It is true that when evidence has been made of record by one party in accordance with the Trademark Rules, it may be referred to by either party for any purpose permitted by the Federal Rules of Evidence. Trademark Rule 2.122(a), 37 C.F.R. § 2.122(a). But that militates against excluding the evidence, and in favor of weighing the evidence and according it whatever probative value it merits. *See U.S. Olympic Comm. v. Tempting Brands Netherlands B.V.*, 2021 USPQ2d 164, *5 (TTAB 2021). The objections are overruled.

Applicant objects to exhibits 66, 72-75 and 77 to Opposer's Rebuttal Notice of Reliance²⁵⁷ on the grounds that they are irrelevant, constitute improper rebuttal, and were not produced during discovery.²⁵⁸

As Opposer correctly states,²⁵⁹ exhibits 66 and 72-75 are relevant because they

²⁵⁶ *See, e.g.*, Applicant's comments regarding Opposer's NOR exhibits 12, 15, and 16. 43 TTABVUE 61.

²⁵⁷ Opposer's Rebuttal NOR, 35 TTABVUE (confidential), 36 TTABVUE (public version).

²⁵⁸ Applicant's brief, 43 TTABVUE 80-82.

²⁵⁹ Opposer's reply brief, 44 TTABVUE 44-46.

concern parodies of or allusions to Opposer's DOUBLE DARE programming, which are relevant to its fame and continued recognition by the public. They rebut Applicant's evidence that the mark is weak and abandoned. And there is no evidence that the documents reflected in these exhibits were requested during discovery.

Exhibit 77 is a complete version of an agreement by which a division of Opposer licensed a third party to use the DOUBLE DARE mark, among other properties, on clothing items.²⁶⁰ Applicant had included two pages of the license agreement in its Notice of Reliance,²⁶¹ so Opposer introduced the entire agreement to provide context.²⁶² Applicant argues that "the document is unsigned and not otherwise authenticated."²⁶³ But Applicant's own Notice of Reliance, which attached two pages of the license agreement, states "[t]he following documents were provided to Applicant by Opposer as part of the discovery process herein. They are each authenticated in Declarations submitted by Opposer as indicated."²⁶⁴ Applicant's Notice of Reliance further identifies this exhibit as "First 2 pages of agreement between Opposer and Bioworld Merchandising, Inc. Dated October 11, 2016, re: licensing of various trademarks."²⁶⁵ Applicant clearly accepted the agreement as valid and authentic. Its objections to Opposer's Rebuttal Notice of Reliance are overruled.

²⁶⁰ Opposer's Rebuttal NOR, 35 TTABVUE 53-75 (confidential).

²⁶¹ Applicant's NOR ex. 4, 28 TTABVUE 7, 99-100.

²⁶² Opposer's reply brief, 44 TTABVUE 45 (citing Fed. R. Evid. 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.")).

²⁶³ Applicant's brief, 43 TTABVUE 82.

²⁶⁴ Applicant's NOR, 28 TTABVUE 5-6.

²⁶⁵ Applicant's NOR, 28 TTABVUE 7.